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Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 423.

STATE OF MINNESOTA,
Appellant,
vs.
NORTHERN SECURITIES COMPANY AND OTHERS.

BRIEF FOR RESPONDENT NORTHERN SECURITIES COMPANY.

W. P. CLOUGH,
Of Counsel for Respondent,
Northern Securities Company.

C. G. Burgoyne, Walker and Centre Streets, N. Y.

STATE OF MINNESOTA

vs.

NORTHERN SECURITIES CO.

Points and Authorities for Defense.

The State Anti-Trust Law.

(Laws 1899, E. 359).

SECTION 1. Any contract, agreement, arrangement, or conspiracy, or any combination in the form of a trust, or otherwise, hereafter entered into which is in restraint of trade or commerce within this state, or in restraint of trade or commerce between any of the people of this state and any of the people of any other state or country, or which limits or tends to limit or control the supply of any article, commodity or utility, or the articles which enter into the manufacture of any article or (of) utility, or which regulates, limits or controls or raises or tends to regulate, limit, control or raise the market price of any article, commodity or utility, or tends to limit or regulate the production of any such article, commodity or utility, or in any manner destroys, limits or interferes with open and free competition in either the production, purchase or sale of any commodity, article or utility is hereby prohibited and declared to be unlawful.

That when any corporation heretofore or hereafter created, organized or existing under the laws of this state, whether general or special, hereafter unites in any manner with any other corporation wheresoever created, or with any individual,

whereby such corporation surrenders or transfers, by sale or otherwise, in whole or in part, its franchises, rights or privileges or the control or management of its business to any other corporation or individual, or whereby the business or the management or control of the business of such corporation is limited, changed or in any manner affected, and the purpose or effect of such union or combination is to limit, control or destroy competition in the manufacture or sale of any article or commodity, or is to limit or control the production of any article or commodity, or is to control or fix the price or market value of the material entering into the production of any article or commodity, or in case the purpose or effect of such union or combination is to control or monopolize in any manner the trade or commerce, or any part thereof, of this state, or of the several states, such union, combination, agreement, arrangement or contract is hereby prohibited and declared to be unlawful.

SEC. 2. Every *person* who shall either directly or indirectly make any such contract, agreement or arrangement, or enter into any such combination, conspiracy or trust as defined in section one (1) of this act, shall be guilty of a felony and, on conviction thereof, shall be punished by a fine of not less than five hundred dollars ($500) nor more than five thousand dollars ($5,000), or by imprisonment in the state's prison for not less than three (3) years nor more than five (5) years.

SEC. 3. Any corporation heretofore or hereafter created, organized or existing under the laws of this state which shall hereafter either directly or indirectly make any contract, agreement or arrangement, or enter into any combination, conspiracy or trust as defined in section one (1) of this act, shall, in addition to the penalty described in section two (2) of this act, forfeit its charter, rights and franchises, and it shall thereafter be unlawful for such corporation to engage in business, either as a corporation or as a part of any combination, trust or monopoly, except as to the final disposition of its property under the laws of this state.

Any corporation organized under the laws of

any other state, territory or country, which is now located or which may hereafter be located within this state, and engages in the manufacture, production or sale of any article therein which shall either directly or indirectly make any contract, agreement or arrangement or enter into any combination, conspiracy or trust as defined in section one (1) of this act, shall, in addition to the penalty prescribed in section two (2) of this act, be prohibited from doing any further business in this state, except as to the final disposition of its property under the laws of this state.

SEC. 4. Any contract by any person, partnership, association or corporation, whether domestic or foreign, made in conducting business contrary to the provisions of section one (1) of this act, shall not be enforced in any court of this state in favor of such persons, partnership, association or corporation.

SEC. 5. Any person who shall enter into any correspondence, negotiations or agreement in this state, or who shall, being a resident of this state, go into another state, territory or country for the purpose of entering into any negotiations or agreement which tend to the formation of any contract or combination forbidden by this act, shall be guilty of a felony, and be subject to all the penalties of this act.

SEC. 6. That for the purpose of carrying out the provisions of this act, any citizen of this state may, and it is hereby declared to be the duty of the attorney general, to institute, in the name of the state, proceedings in any court of competent jurisdiction against any person, partnership, association or corporation who may be guilty of violating any of the provisions of section one (1) of this act, for the purpose of imposing the penalties imposed by this act, or securing the enforcement of section three (3) hereof. *Provided*, that when such proceedings are instituted by any other than the attorney general, the state shall not be in any manner liable for the costs or for any of the expense of such proceedings. And *provided, further*, that when the attorney general deems it necessary, he is hereby authorized to employ counsel to assist in the prosecution of any action brought under the provisions of this act.

SEC. 7. The word person as used in this act shall be construed to include any corporation or association formed or existing under any law of this state or any other state or country.

SEC. 8. This act shall take effect and be in force from and after its passage.

Approved April 21st, 1899."

This statute is a plain attempt by a State to regulate commerce between the States and with foreign countries. The Legislature did not proceed upon the theory of a separation of State trade from Interstate and International. This highly penal law contains no evidence that the Legislature would have been willing to adopt it if its operation were restricted to trade within the jurisdiction of the State.

This may be an instance where the plain invalidity of part of what the Legislature sought to do annuls the whole.

Again, the forbidden acts must be done within the jurisdiction of the State. This limitation attaches to all State legislation. The power of a State to adopt and enforce a policy on any subject is territorially restricted to its own domain; it does not extend to that of other States or countries. Section 2 of the State act shows the intention of the Legislature to restrict the operation of the act to things done within the State of Minnesota, by declaring the doing of them to be a felony, punishable by fine or imprisonment, or by both. The Minnesota Legislature could never design to make criminal, or to penalize, anything done wholly in the State of New Jersey, or in the State of New York.

The things questioned here have been limited to purchases made in the State of New York, by a corporation of the State of New Jersey, of shares, some

in a corporation of the State of Wisconsin, and others in a corporation of the State of Minnesota. Nothing connected with any of these purchases has ever been done in the State of Minnesota. No act of any kind in connection with any of the shares purchased has been, or is intended to be, done in the State of Minnesota. The only acts which the Securities Company can ever do in connection with the stock of either railway company, is to vote upon it at stockholders' meetings, and to receive the dividends which the company may declare and tender to its stockholders. The Securities Company has done neither of these acts, with reference to a single share of stock it owns, within the State of Minnesota, nor does it contemplate doing any of them there. In neither company are the stockholders required to do any act within the State of Minnesota in the exercise of their rights.

The Northern Pacific Railway Company, being a corporation of another State, its stockholders naturally need not go to Minnesota for any purpose. While the Great Northern Railway Company has been created by the State of Minnesota, its charter expressly authorizes it to do all its corporate business, in which stockholders may participate, as distinguished from its transportation business, in which the stockholders cannot participate, outside the State, and in any other State or foreign country.

Act 1865, p. 1,100, fol. 4,381.

The ownership of Great Northern stock is, therefore, not a matter that could in any way require the direct or indirect performance of acts within the State of Minnesota.

These considerations alone, put all that has been

done or contemplated, beyond the intent and operation of the State Anti-Trust Act.

But if some or all of the things which have been done in this matter had been done in the State of Minnesota, the provisions of the first clause of Section 1 would not apply. If any part of this clause could be here applicable, it must be the first six lines, which are as follows :

> "Any contract, agreement, arrangement or conspiracy, or any combination, in the form of trust or otherwise, hereafter entered into, which is in restraint of trade or commerce within this state, or in restraint of trade or commerce between any of the people of this state, and any of the people of any other state or country, * * * is hereby prohibited, and declared to be unlawful."

The remainder of clause 1 is limited to dealings in the market, in things bought and sold there—to things having a "market price." Transportation is a service, and the conditions and rates of compensation for its performance are fixed by tariffs made by the carrier, and filed in an office designated by law. From the rates and conditions thus established and announced, the carrier cannot deviate in favor of or against any person.

The terms "purchase", "production", and "sale" must mean other things than contracts for service.

The first clause of the paragraph is practically identical with the first section of the Federal Anti-Trust Act. Congress and the State Legislature clearly meant to penalize the same things. The State law cannot have broader scope or application than the Federal. Decisions and arguments bearing upon the former are, therefore, equally applicable to the latter.

In making this charge, the State necessarily begs

two questions, which it has brought no proof to answer, viz.:

Whether it would in fact be more profitable to Northern Securities Company, that Northern Pacific and Great Northern should cease to compete? and, whether all persons can, at all times, be expected to break all laws, which, if observed, would tend to reduce the profits of their business.

Unless both these questions must necessarily be answered in the affirmative, without evidence to prove them, the State's case, so far as it rests upon restraint of trade, must fail.

There is no ground for saying that competition between themselves will be detrimental to the revenues of the two railways; and that is undoubtedly the test which the State means to apply.

It cannot be shown, much less assumed, that either of the systems is smaller or poorer for the relations they have borne each other for so many years, or that either would be larger or richer now, if a majority of the stock of each had always been owned by one man. And it must be assumed that the Securities Company will be able to find out what will be most profitable to it, in the long run. It cannot be assumed that the Securities Company will want to change a policy of these companies, toward each other, under which both have prospered for so long. Again, in any case where it would be unlawful for the Securities Company to use its power and position as the majority stockholder, in each of these companies, to suppress competition and restrain trade, it would be criminal; and we cannot assume that any one will commit a criminal act, merely because it might also be assumed that its commission would

be gainful to the doer. Many men, perhaps the average man, might, for profit, disregard a merely directory law; but breach of a criminal law is different. Few men will commit crime, merely for gain. The assumption in advance of the fact, is always that a crime will not be committed. That must be the assumption here.

It is not charged that the railway companies have ever agreed themselves, or that any one else has agreed for them, that they will not hereafter compete for transportation. It is not even charged here that such an agreement is contemplated, by or between anybody. It is merely charged, that, by reason of the purchases and sales of certain shares of stock, it will not hereafter be to the special gain of the present owner of these shares that the two companies shall compete, and that, therefore, it is to be presumed that they will not compete.

Mere motive for competing can never be weighed, measured, nor otherwise computed. Hence it is not a thing the law can regulate. It changes with the ever changing conditions in all trade. When demand overtakes supply all sellers become of one mind to put prices up, but that is no crime. On the other hand, when supply overtakes demand, all buyers become of one mind to put prices down; but that is no crime, either. In each condition all the dealers on one side of the trade cease to compete with each other, but they do not thereby "restrain trade."

To-day two manufacturing concerns may be offering their similar products in the same markets, to the same buyers, and each be making effort to sell. To-morrow one of them having more capital and ambition than the other, plans to extend its trade to a volume beyond

the capacity of its own plant, and perhaps, to a volume equalling the capacity of the plants of both. To realize the hoped-for increase, it arranges with the other to buy its whole output, on terms more attractive to the latter than the business of dividing up its sales among many customers. While such an arrangement lasted, its undoubted effect would be to remove all motive for competition between the two concerns; but none would assert that any law would be violated in consequence.

The device called "pooling," which has for its main feature the putting of the whole, or of some part, of the receipts of several competing concerns into a common fund, or "pool," and the consequent redistribution of them among the contributors, without regard to the amount contributed, plainly takes away, or at least reduces, the motive for competition between the parties. In fact, to do so, is generally the very purpose of the arrangement.

Such things were common both in England and in this country, until generally prohibited by specific statutes; but the common law never regarded them as "contracts, combinations or conspiracies in restraint of trade," or as prohibited on any other ground. This appears from a case in the High Court of Chancery of England.

Hart vs. London & Northwestern Ry., 2 Johnson & Heming, 80.

This was a suit by a stockholder to restrain the carrying out by his company of a pooling contract with several other companies, by which the earnings of three lines of railway, running from London to Edinburgh, and comprising practically all the rail lines between the two places, were pooled for a period of

fourteen years absolutely, and thereafter until the pool should be abrorogated upon six months' notice.

It was conceded that the purpose was to regulate competition between the parties.

The arrangement was not made under authority of any statute, but depended upon the common law.

The Court held the pool valid and dismissed the bill, supporting its conclusions by citation of several previous cases where similar rulings had been made.

Leading counsel for plaintiff was Sir H., afterward Lord Cairns, to whom the report attributes the main argument against the validity of the pool, that it constituted a *quasi-partnership*. It did not occur to him and his learned associates to attack the pool "as a contract, combination or conspiracy to restrain trade." No such claim, under the common law, in regard to pooling appears ever to have received support from, or even in, any English Court.

The construing of the State and Federal Anti-Trust Acts is merely the finding of the meaning of the common law terms they contain.

The terms "restrain" and "restrict," in the common law, have never applied to mere mental states or conditions, but only to things done and acts performed.

Action of no kind has ever been restrained, until some positive bond has been placed upon it. Mere mental indifference is no bond. It "restrains" or "restricts" nothing whatever. It leaves the fullest and freest power of action. Conditions that leave the minds of men indifferent as to whether they will compete or not, or as to the lengths to which they will carry competition, place no "restraint" on trade, or even on competition. Neither is "restrained" by indifference. They are simply not advanced by it. But

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there is the widest difference between omission, or neglect, to trade, or to compete in trade, and "restraint" of trade and of competition in trade. The law could not make men trade, and never has aimed to do so. It can merely say that they shall not bind themselves not to trade, or not to compete in trade.

An examination of the numerous English and American cases dealing with such combinations and contracts, both before and since the passage of the anti-trust acts, makes it easy to see what must be the elements of a transaction to put it in the category of "combinations or contracts in restraint of trade." It also makes easy the recognition of transactions not rightfully belonging to that category.

The uniform characteristics of the transactions classed as such restraints have been, that they were executory agreements; that they provided expressly, or by unavoidable implication, for the future doing or abstention, by some or all the parties to them, of some act or acts; and that the acts provided to be done or refrained from were acts immediately and directly connected with trade operations, and having an immediate and direct effect on them.

Every arrangement that the Federal Courts have thus far held to be such a restraint has had precisely those characteristics.

No arrangement which by its terms is executed, and leaves nothing to be done by the parties to it in future, has heretofore been classed as in restraint of trade.

In particular, purchases of property have never been so classed.

No English court has ever held a purchase to be in restraint of trade, and England has been a great trading country for centuries.

Numerous instances must have happened yearly there, in which trade or industrial competitors have bought out each other's plant and business, or entered into partnership with each other ; or formed corporations to buy up the individual establishments and succeed them in the same line of trade. Such processes have always been a feature of the business organization of every trading and industrial people, and are not the inventions of the last twenty years, nor confined to America. None have been more jealous of combinations, or more zealous to preserve competition than the English ; and yet it does not appear ever to have been suggested, in any English court, that buying and selling could restrain trade.

No Federal Court has ever held that it does. With the possible exception of the Supreme Court of the State of Illinois, the court of last resort of none of the individual states has ever so held.

There is the broadest inherent difference between an agreement by the owners of two competing concerns to divide territory, to restrict output, or to maintain prices, and the outright unconditional purchase of the property and business of one of them by the other. In the former case, the intent of the parties is clearly restrictive. Decrease of trade is the natural and logical result of such an arrangement. Increase under such conditions is practically impossible.

But if one of them buys outright the plant and business of the other, that puts him into position to increase the volume of the trade beyond the previous total, by making the concessions in prices that increased volume always permits.

In itself, the purchase of property employed in trade, by a former competitor, is an arrangement

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adapted rather for the enlargement of business than for its diminution. In most instances, enlargement and not diminution directly results from it. The true interests of the purchaser commonly lie that way, and he usually is capable of seeing them.

A presumption that the buyer of a competing property will use his purchase to diminish trade, would have to rest upon the theory, that the buyer himself will overlook his own real interest, plainly visible to everybody else, which lies in his doing more business, and will throw away his opportunities by trying to do less.

Men able to acquire the money or credit needed for transactions of that sort can be safely trusted to avoid such blunders.

A presumption that the buyer of railways, more or less in competition, will or can use his power to thereafter limit the volume of transportation on either, would not have the support of any experience.

A factory or a store can be closed, and the business transferred to another establishment.

A railway must always be operated to be profitable. It cannot be stopped without making a total wreck of the investment. Its success, as an earner of revenue, always ultimately rests on the volume of its traffic. The larger the traffic, the cheaper the cost of operation, per ton and per passenger. The cost of moving traffic units, on all roads, is fixed by the volume. As the number of tons and passengers increases, the cost for operating, per ton and per passenger, decreases; and *vice versa*.

It is always the direct interest of railroad owners to bring the volume of traffic on every line up to the largest possible point.

Some stockholders in railroad companies sometimes imagine themselves benefited by decrease in volume of the traffic of other companies; but none has ever been found who thought so about his own. In the long run, operating cost determines rates. It could not be otherwise. A road able to increase its volume of traffic, and in that way to reduce the cost per ton or passenger handling it, can afford to, and always does, attract additional business by sharing the savings with its patrons.

Nobody is so vitally interested in the largest possible movement of trade as the owner of railways. This is proven by unbroken experience.

Every arrangement for uniting the control of previously competing railroads in this country, whether by lease, purchase, or acquisition of stock, and every increase in the size of the various systems, and in the extent of territory reached by them, has resulted in large increases in facilities and traffic, and, as a direct and necessary result, in lower rates to the public.

Ownership of the stock of both these railroad companies and voting thereon at the only places where it can be voted—namely, stockholders' meetings—cannot of itself increase or lessen the degrees of competition between the two. The powers of the two corporations over all matters pertaining to their construction and transportation business are vested in the respective boards and not in their shareholders. On this point the Northern Pacific charter reads:

> "All of the affairs of said company shall be managed by a board of directors, who shall be stockholders, and who are hereby invested with all the powers of the corporation, save as hereinafter provided."
>
> Ev., p. 1145, fol. 4563.

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The excepted powers relate to merely corporate, as distinguished from transportation matters. The Great Northern charter on this point reads :

> " And all the affairs and business of said company shall be conducted by or under the direction of the board of directors, and they are authorized, for the purposes specified in this act, to make and establish regulations and by-laws, and to do all things necessary to be done and not inconsistent with the Constitution and laws of the United States, or by the laws of this territory or this act."
> Ev., p. 1100, fol. 4381.

In regard to every construction and transportation matter, therefore, the Board of Directors, and not the stockholders, is the corporation. The ownership of the majority of both stocks has not the slightest direct effect upon the conduct of the business of either company. It may act on the motives of boards and officers ; but the laws have never tried to deal with mere power or motive. They cannot. What Federal and State laws have prohibited as combinations and contracts " in restraint of trade," in acts, and not mere power or motive.

Power acquired by purchase is not " in restraint of trade."

The Decisions of the Federal Courts.

The meaning of the Anti-Trust Act first prominently came before this Court in *United States vs. Knight, 156 U. S., 1.*

The American Sugar Refining Company was a corporation under the laws of the State of New Jersey, engaged in the business of buying raw sugar throughout the world, importing it into the United States, there

refining it, and afterwards, when so fitted for sale, selling it throughout the United States.

The E. C. Knight Co. and three other companies were also corporations under State laws, and each owned and operated sugar works near Philadelphia.

The American Sugar Refining Company, in 1892, bought from the individual holders thereof all the capital stock of each of the four Philadelphia concerns, and paid for the same by transfer of its own stock to the vendors, at agreed prices. The Government thereupon filed its bill, in a Circuit Court of the United States, asking to have the sales annulled, as violating the Anti-Trust Act, and to compel a return of each set of shares to its former owners. The Circuit Court made a finding of the facts in the controversy, and, as a conclusion of law, held the transactions valid. The Government appealed. The appeal was heard in the Supreme Court and the judgment of the lower Court was affirmed.

In the course of its opinion the Supreme Court said :

> " Congress did not attempt thereby to assert the power to deal with monopoly, directly as such, *or to limit and restrict the rights of corporations created by the States, or the citizens of the States, in the acquisition, control or disposition of property, or to regulate or prescribe the price or prices for which such property, or the products thereof shall be sold ; or to make criminal the acts of persons in the acquisition and control of property, which the states of their residence or the nation sanctioned or permitted* " (p. 16).
>
> " There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce ; and the fact, as we have seen, that trade or commerce may be indirectly affected, was not enough to entitle complainants to a decree. The subject matter of the sale was shares of manu-

> facturing stock, and the relief sought was the surrender of property which had already passed, and the suppression of the alleged monopoly in manufacture, by the restoration of the *status quo* before the transfer ; yet the Act of Congress only authorized the Circuit Court to proceed by way of preventing and restraining violations of the act, in respect of contracts, combinations and conspiracies in restraint of international trade or commerce " (p. 17).

The Pennsylvania corporations, whose stock the American Sugar Refining Company bought and paid for with its own stock, were not merely the owners and operators of works for performing a chemical and mechanical process on raw sugar. That was an incident of their business, but not its chief feature. The E. C. Knight Co. was incorporated under the Laws of the State of Pennsylvania for the purpose of " *importing*, manufacturing, refining, *and dealing in* sugar and molasses " (p. 2). The charters of the other three Philadelphia concerns were similar.

The four defendants

> " were located in Philadelphia, and, prior to March, 1892, produced about 33 per cent. of the total amount of sugar refined in the United States, and were in active competitien with the American Sugar Refining Company, and with each other, *selling their products wherever demand was found for it, throughout the United States.*"
>
> Findings of Court, p. 5.

The real business of the Philadelphia companies was buying sugars in foreign countries and selling them throughout the United States. The works in Pennsylvania were not places for the refining the sugars of others for hire, nor places merely for the refining of sugars grown in the State of Pennsylvania, for Pennsylvania grows no sugars. The works were

mere implements for fitting raw sugar, imported and owned by the companies themselves, for resale by the same companies throughout the several States in this country.

The companies whose stocks the American Sugar Refining Company bought, therefore, were not mere manufacturers, local to the State of Pennsylvania, but were also international and interstate traders.

The purchase of their stocks by the American Refining Company carried precisely the same control over the international and interstate trade, which was the principal business, as it did over the sugar works, that were mere tools of that business.

> "Prior to March, 1892, the American Sugar Refining Company had obtained control of all refineries in the United States, excepting the four located in Philadelphia, and that of the Revere Company in Boston, the latter producing about 2 per cent. of the amount refined in the country."
> Findings of Court, p. 5.

The obvious effect, upon the foreign and interstate trade of the country, of acquisition of control by the American Sugar Refining Company of the Pennsylvania companies must have been, firstly, to diminish the number of buyers of raw sugars, by which the prices for that article would naturally be weakened, and, secondly, to decrease the number of sellers, throughout the country, of refined sugars, by which prices of refined would naturally be strengthened. Such matters of common observation and knowledge could not possibly have escaped the attention of the Court while this case was under consideration; and it must be assumed that, in arriving at its judgment, the Court gave them the weight which was their due.

Some isolated expressions of the opinion in this case have been pointed out as indicating that the Court meant to place its decision on the narrow ground of the business of the Philadelphia concerns being mere manufacturing, localized within a single state. How could the Court have meant that, in view of the facts?

The Court must have intended to base its conclusions upon all the facts found, among which were that the business controlled by the purchased stock was interstate and international—importation of the raw materials and sale of the finished product throughout the country. Nobody ever questioned these facts.

The real point decided, must have been the one stated in the above quotations from the opinion, viz., that a transaction limited to the purchase and sale of property does not violate the act.

The sugar case also directly refutes the doctrine that the Anti-Trust Act is violated by one person or corporation acquiring, through purchase of property, mere power to restrain the interstate trade of two concerns competing for that trade. Undoubtedly it would have been a violation of the act if the American Sugar Refining Company, instead of buying the stock of the four Philadelphia concerns, had made an agreement with them to divide territory, or to keep down their bids for raw sugar to designated prices, or to maintain stipulated prices on refined sugar, or to wholly or partially retire from business, or to restrict output. When the American Sugar Company bought the entire capital stock of each of the four corporations, it certainly acquired the fullest power to elect a Board of Directors for each company that could manage the business of that company as it should see fit.

The board could cause the company to bid as much

or as little for raw, and to offer refined for as much or as little, as it should choose. It could restrict the output or stop business operations wholly. For such action the board could be questioned by the stockholders alone.

The power to cause the doing of all these things was acquired by the American Sugar Refining Company when it bought the stocks, and by the mere act and fact of its purchases. The American Sugar Refining Company knew that, too. The acquisition of that power was the chief object of the purchases.

> "The object in purchasing the Philadelphia refineries was to obtain a greater influence or more perfect control over the business of refining and selling sugar in this country."
> Findings of Court, p. 6.

The extent or completeness of power over the whole volume of international and interstate trade was not regarded as making invalid a purchase of property otherwise legal; for, as shown by the above quotations from the findings, the purchases by the American Sugar Refining Company completed its control of 95 per cent. of the total sugar business of the country.

This case has never been overruled, modified or in any way subtracted from, by any subsequent decision of the Supreme Court.

The case also refutes the claim that purchase by one corporation of the stock of another, and payment therefor in its own stock, is a trust or combination. The American Sugar Company bought its stocks that way.

U. S. vs. Trans-Missouri Freight Association, 166 U. S., 290, and *U. S. vs. Joint Traffic Association*, 171

U. S., 505, presented states of fact similar in all essential respects.

The Trans-Missouri Association included the operations of practically all the railway mileage lying west of the Missouri River. Its memorandum of association, subscribed by each member, provided for a chairman, and also that "A Committee shall be appointed to "establish rates, rules and regulations on the traffic "subject of this Association, and to consider changes "therein, and make rules for meeting the competition "of outside lines. Their conclusions, when unanimous, "shall be made effective, when they so order."

The contract also imposed fines for disobedience of rulings of the association.

Parties to the contract could withdraw on thirty days' notice, but during that period remained subject to the contract.

Report, pp. 294–5.

The Joint Traffic Association was composed of about thirty railroad companies, operating between Chicago and the Atlantic Coast. Articles were subscribed by each member, providing that the affairs of the Association should be administered by several boards, and that it should have jurisdiction over all competitive traffic, with certain exceptions, passing through the Western Trunk Line termini and such other points as the managers should designate.

The published schedules of rates then in force were reaffirmed; and from time to time the managers were to recommend such changes in rates, fares and charges as might be reasonable, just and necessary for governing the traffic covered by the agreement, and for protecting the interests of the parties to the agreement.

A failure to observe such recommendations, by any of the parties to the agreement, was to be deemed a violation of the agreement. No company was permitted in any way to deviate from or to change the rates, fares, charges or rules set forth in the agreement or recommended by the managers, except by resolution of its board of directors, and such action should only affect its own road.

A copy of any such resolutions should immediately be forwarded by the company making same to the managers of the association, and the change was not to become effective until thirty days after the receipt of such resolution by the managers. Upon receipt of any such resolution, the managers were to act promptly " for the protection of the interest " of the members.

Joint freight and passenger agencies might be organized by the managers, and, if established, were to be arranged so as to give proper representation to each member. Soliciting or contracting passenger or freight agencies were not to be thereafter maintained by the companies, except with the approval of the managers, and no one that the members objected to was to be employed or continued in the agency.

Any violation of the agreement was to be followed by a forfeiture by the offending company, in a sum to be determined by the managers, which should not exceed $5,000; or, if the gross receipts of the transaction, which violated the agreement, should exceed $5,000, the offending party should, in the discretion of the managers, forfeit a sum not exceeding such receipt.

The sums thus collected were to go to the payment of the expenses of the association, except that the offending company should not participate in the distribution of its own forfeiture.

The agreement also provided for assessments upon the companies, to pay expenses.

No one retiring from the association before the time fixed for final completion, except by unanimous consent, should be entitled to any refund from the contributions.

The agreement was to take effect January 1, 1896, and continue for five years, and thereafter until 90 days' written notice by any company of its purpose to retire.

Neither of the arrangements condemned in these two cases included any sale or purchase of property. Each company that signed the association articles kept everything it had, but turned the management thereof, in vital particulars, over to another. A large number of companies, competing for the same interstate traffic, put their rate-making power into common hands, for a longer or shorter period of time, and promised to observe the rates thus fixed.

In the Trans-Missouri case, the power of the committee was absolute, for at least the 30 days required for notice of withdrawal, and during membership departure from the committee's tariff would not only require violation of an express and specific agreement, but subject the offender to a stipulated penalty, as well.

The Joint Traffic agreement also put the rate-making power out of the hands of the member companies for at least thirty days; that is to say, any change of rates previously fixed by the association could not be made, even by the Board of Directors of a company without 30 days' notice to the association. Except by unanimous consent, no company, once a member of the association, could withdraw, without subjecting itself to the loss of its contribution to the common

fund. Any violation of the agreement during membership was punishable by a fine equal to the total receipts from the transactions involved. The member companies even renounced during membership the right to individually solicit traffic. The agreements involved in these cases, therefore, not only did not resemble, but were in perfect contrast with, the absolute purchase and sale of property. The decisions did not overrule or even qualify that in the Sugar case. The two groups of cases covered transactions totally dissimilar, and mark the clear line between those which are not transactions in restraint of trade and those which are.

The Court did not leave to necessary inference the distinction between the two classes of transactions, but in its opinion in each case expressly declared it. Thus, in the Joint Traffic case, the Court said :

> " Nevertheless, we might say that the formation of corporations for business or manufacturing purposes has never, to our knowledge, been regarded in the nature of a contract in restraint of trade or commerce. The same may be said of the contract of partnership. * * * We are not aware that it has ever been claimed that a lease or purchase by a farmer, manufacturer or merchant, of an additional farm, manufactory or shop, or the withdrawal from business of any farmer, merchant or manufacturer, restrained commerce or trade within any legal definition of that term, and the sale of a good-will of a business with an accompanying agreement not to engage in a similar business, was instanced, in the Trans-Missouri case, as a contract not within the meaning of the act ; and it was said that such a contract was collateral to the main contract of sale, and was entered into for the purpose of enhancing the price at which the vendor sells his business." * * *

In using this language the Court was not taking the trouble to say that two and two do not make seven.

When it spoke of the formation of corporations and partnerships it was not referring to those started as new enterprises, by persons not previously engaged in the same line of business. So, when it spoke of purchases of property, it did not trouble itself to say that the owner of a tannery may rightfully buy an iron foundry.

On the contrary, the Court had in mind persons and properties previously competing for the same trade. The questions which defendant's counsel put to the Court, and which the Court answered in the quoted passage of its opinion, concerned purchases and sales, and corporations and partnerships, between former competitors, whereby rival properties and trades are put together into a common ownership and control.

It may be further remarked that the nature of the arrangements in the Trans-Missouri case and in the Joint Traffic case was such that, if they restrained trade at all, they did so immediately upon the signing of the agreement, and subsequent proceedings under it were immaterial.

The moment each member subscribed the articles, its ability to name rates, or to independently solicit business had been renounced. The mere act of signing had this direct and necessary effect upon the trade which the articles covered.

At the same term as the Joint Traffic case, *Hopkins vs. United States*, 171 U. S., 578, was decided. The arrangement there attacked was executory in character, but held by the Court not to be directly and immediately in restraint of trade, and, therefore, not unlawful. In its opinion the Sugar case was cited, with no remark throwing doubt upon its authority, or showing any purpose of the Court to limit its scope.

The *Addyston Pipe Case*, 175 U. S., 211, was also an instance of an executory contract, entered into by six separate manufacturers of cast-iron pipe for gas, water and sewer purposes. Each party retained ownership of its property and continued to run its manufacturing business. These shops together controlled the market in their line of goods, over a territory comprising several States. Their owners entered into an agreement to control prices. This was done by means of a managing Board, composed of a member from each shop, to which all inquiries for pipe coming to any of the shops was referred. When an important contract for pipe was about to be let, the Board estimated the highest price that would be likely to secure the sale, and then received from each individual member an offer of the amount of bonus he would give for the privilege of exclusively bidding that price at the letting. The member offering the largest bonus got the privilege. The bonus was divided among the remainder, and, in consideartion thereof, they refrained from bidding, or bid higher, at the letting.

This case, therefore, fell into the same group as the Trans-Missouri and Joint Traffic cases, and not into that of the Sugar case.

In every case where a United States Court has held an arrangement invalid under the Anti-Trust Act it has been merely an executory contract for regulating prices, or output, or both. In none of those cases has there been involved the validity of a sale of property in any form, whether lands, goods or corporate stocks. Among them, in addition to those cited, have been:

U. S. vs. Coal Dealers' Assn., 85 Fed. Rep., 252.

Moore vs. U. S., 85 Fed. Rep., 465.

U. S. vs. Chesapeake & Ohio Fuel Co., 105 Fed. Rep., 93. 115; do., 620.

The Decisions of the State Courts.

The cases in the State Courts, regarded as a body, have proceeded along the same general lines as have those in the Federal Courts; that is, executory agreements only, and not sales of property, have been held invalid, as unlawfully restraining trade.

One of the early and most prominent of the State cases was:

People vs. N. River Sug. Ref. Co., 121 N. Y., 582.

This suit was brought by the Attorney-General of the State of New York, against a corporation organized under the general laws of that State, *to vacate its charter and annul its corporate existence.*

An agreement was made by and between various corporations engaged in the sugar refining business, including the North River Co. To this agreement the name of the defendant was signed by its secretary, as he testified, "by virtue of authority * * * from the stockholders and trustees."

By the agreement, a "Board" was formed. The parties agreed to transfer all their shares of capital stock "to the names of the Board, *as trustees*, to be held by them, and their successors, as members of the Board, *strictly as joint tenants*," with all the rights and powers incident to stockholders in the several corporations." The Board was authorized to transfer "to "such persons as it may be desired to constitute di- "rectors or trustees, or other officers of corporations, "so many of the shares as may be necessary for that "purpose." In lieu of the capital stock, certificates should be issued by the "Board" to the contracting

parties, in specified proportions. Each of the parties should maintain a separate organization, and carry on and conduct its own business, paying over the profits to the "Board;" the aggregate, or such amount as should be designated for dividends, to be proportionally distributed by the "Board" to the holders of certificates.

The number and amount of shares to be issued by the "Board" was fixed, with a proviso, that "they may, from time to time, be increased or diminished by deeds executed by a majority in value of the certificate holders."

Defendant's stock was transferred and trust certificates issued to its stockholders, as provided for. The "Board" elected defendant's officers and Board of Trustees, having transferred to each a share of the stock, to enable him to hold office.

The Court held, that the transaction was *not an absolute sale of defendant's stock by its holders*, but that a trust was created in the "Board" to whom, as a trustee, and upon the trusts declared, the stock was transferred, that the certificates issued were formal declarations of the trust, and through the operation of which the stockholders retained the beneficial ownership; that, by the deed, the corporations had entered into a copartnership, vesting the partnership power in the "Board."

If there had been an actual sale of the stock, to the Board, it would not have been illegal.

Opinion, p. 611, at top.

The offense of which the defendant was convicted was that it had unlawfully "entered into a partnership" (p. 623, at bottom).

It is a matter of common knowledge that, shortly after this decision of the Court of Appeals, the parties planning a common control of the sugar business of the country acted upon the Court's suggestion that an outright purchase of the stock would be legal, and caused the formation of the American Sugar Refining Company, which made the purchases.

Proof of the soundness of the suggestion exists in the fact that the American Sugar Refining Company has ever since continued to hold and exercise all rights of ownership over the New York sugar concerns, without challenge from the State, or any other public authority.

In the State of Pennsylvania, the Courts have held that an arrangement between coal companies to fix prices and divide the trade is illegal, without reference to any statute.

Morris Run Coal Co. vs. Barclay Coal Co.,
68 Penn. State, 173.

This was an agreement between five coal companies, operating mines in Pennsylvania, to divide the coal regions of which they had control, to appoint a committee to take charge of their interests, and to appoint a general agent of all the companies at Watkyns, New York; all coal to be delivered through him in the different markets, at such times and to such persons as the committee might direct. Each coal operator should deliver coal only to the extent of his proportion, and at prices adjusted by the committee.

The agent was empowered to suspend shipments by any operator beyond his allotted proportion. This arrangement was held a combination in restraint of trade and invalid. It was of precisely the character of

every arrangement held invalid by a United States Court under the Anti-Trust Act of Congress. It was an executory contract for the management of a business in a specified way, and not for the absolute sale of the business or of the property with which it was conducted.

No Pennsylvania case or even dictum has been found where the validity of a sale of property has been called in question as a restraint of trade.

Morris Run Coal Co. vs. Barclay Coal Co. has often been cited in cases founded on alleged restraint of trade, but it does not go farther than above stated.

In the State of Ohio, *Central Ohio Salt Co. vs. Guthrie*, 35 Ohio State Rep., 656, grew out of a combination of salt manufacturers.

A number of separate concerns combined to regulate the price of salt, the combination to last for five years. The Association was not incorporated, but was to do business under the name of the "Central Ohio Salt Co." The individual manufacturers retained their works and carried on their producing business, as before; but one of the clauses of the Articles of Association was: "All salt made or owned by the members of this association shall be branded as the directors may require; and become the property of the company when packed out in barrels." P. 668. Departure by members from prices for products fixed by the association, was to be punished by fine.

This suit was brought by the Association, against one of its members, to enforce the agreement; and it was held void, and not enforceable.

State vs. Standard Oil Co., 49 Ohio State, 138.

This was an information to dissolve the Standard Oil Co., of Ohio.

An agreement had been made between the holders of all the shares of the defendant, except 7, to place their stock in the hands of trustees, for the management of the business of the company, in harmony with other competing companies.

All the officers and directors of the company signed the trust agreement, in their individual names, but did not affix the corporate seal, nor their official designations. It was held that, notwithstanding the absence from the contract of the corporate seal, and the official designations of the signing officers and directors, it was nevertheless to be deemed that the corporation had become a party to the contract, and the judgment prohibited it from carrying the same into effect.

The trust agreement did not include a sale of any property. The stockholders retained their beneficial ownership of the stock, and merely transferred the voting power upon it, for the purpose of enabling the trustees to manage the corporation's business in combination with that of former competitors.

A case often cited is *Richardson vs. Buehl & Alger, 77 Mich., 632.*

That was a suit to restrain the defendants from enforcing repayment of advances to plaintiff by sale of certain stocks held as collateral. Plaintiff claimed that the right of defendants to enforce repayment did not exist, because of certain contracts for combining the match business of the country. The Court held these contracts contrary to public policy, as in restraint of trade and denied the injunction. No question of the

right to own or hold property, or of the validity of any sale of property, was in the case.

In the State of Illinois a series of cases involving alleged restraints of trade have been ruled upon.

Chicago Gas Light Co. vs. People's Gas Light Co., 121 Ill., 530.

In 1849 a gas company was chartered with the exclusive privilege of supplying Chicago with gas for the period of ten (10) years. In 1855 another gas company was formed under a special charter, empowering it to manufacture and sell gas in the same city, after expiration of the exclusive privilege given to the prior company. Each company erected the necessary works in the city for manufacture and supply of gas, when the two companies made a contract by which they exchanged mains and pipes in parts of the city, and each agreed with the other to have exclusive right of supplying gas in its part of the city for 100 years, neither to interfere with the business of the other in its territory.

By its charter, and city ordinances of Chicago, each company was empowered to lay pipes in all streets of the city. The contract above mentioned was observed by both parties several years, when the Chicago Gas Light Co. prepared to violate it, by extending its pipe system into the territory assigned by the contract to the exclusive exploitation of the People's Company. The latter then began this suit, for an injunction enforcing the contract, and restraining the Chicago Company from making the threatened invasion of territory.

The following quotation from the opinion of the Supreme Court fully states the point decided:

> "Neither appellant or appellee has any power to make the contract now under discussion. By

the amendment of February 7, 1865, appellee was authorized to borrow money, and to mortgage or lease any of its property or franchises; but in April, 1862, neither the charter of appellant, nor that of appellee conferred any authority to sell, transfer, assign, or make over, to any other company, any of the powers or franchises therein granted. By the contract, appellant virtually assigns, surrenders, and transfers all its rights under its charter, to make and sell gas in the West division to the appellant. The authority to assign and transfer the privilege of making and selling gas is not incident to, nor necessarily implied from the power of making and selling gas.

"Corporations have such powers, and such only, as the Act creating them confers, and are confined to the exercise of those expressly granted, and such incidental powers as are necessary to carry into effect those specifically conferred" (pp. 546-7).

The bill was dismissed on the above grounds. The question of title to the property transferred was not litigated. The only questions litigated were the validity and enforcement of the executory features of the contract.

People vs. Chicago Gas Trust Co., 130 Ills., 269.

Information against the Company,

"that the said Chicago Gas Trust Co. * * * has usurped and unlawfully exercised, and now usurps and unlawfully exercises, powers, liberties, privileges, and franchises not conferred by law, to wit, the power, liberty, franchise, and privilege of obtaining, by purchase, or in exchange for its own stock, and holding and owning * * * a majority and controlling interest in the shares of the capital stock," etc. (p. 273).

The corporation was formed under the general laws of the State of Illinois, by the filing of articles of incorporation. These articles specified the objects of

the company to be: (1) to produce gas and electric light; (2) to buy, sell or hold the stock in other similar companies.

Pp. 274–5.

In the course of its opinion the Court said:

"The power to purchase and hold stock in other companies must be the subject of legislative grant, if not in all cases, at least in cases where it cannot be implied from the powers expressly granted. The general incorporation law contains no such grant of power by the legislature. Can a corporation organized under the law be clothed with such a power by merely naming it in the statement filed with the Secretary of State? We think not" (p. 286).

"Even if shares of stock be regarded as personal property * * * section 5 of the general law provides that corporations formed under it 'may own * * * so much * * * personal estate as shall be necessary for the transaction of their business, and may sell and dispose of the same when not required for the uses of the corporation * * * and may have and exercise all the powers necessary and requisite to carry into effect the objects for which they may be formed.'"

"*This language negatives the idea that corporations formed under the general law can exercise the power of buying and selling the stock of other companies. A company engaged on its own account in manufacturing and selling gas does not need the stock of other gas companies in order to transact its business. Hence, it is forbidden to own such stock, the same being personal estate*" (p. 287).

"We have already seen that, where the object of forming a gas company is to engage in the business of making and selling gas, the purchase of stock in other companies is not necessary to carry such object into effect. *Therefore, the general incorporation act not only does not expressly authorize the purchase of such stock, but impliedly forbids it, in cases where the main purpose of the company is other than the purchase and sale of stocks*" *(pp. 267–8).*

> " Our conclusion upon this branch of the case is, that if the Chicago Gas Company be regarded as a corporation formed for the purpose of creating or operating gas works, and manufacturing and selling gas, *it has no power to purchase and hold or sell shares of stock in other gas companies, as an incident to such purpose of its formation* even though such power is specified in its articles of incorporation " (p. 258).

This ruling of the Court completely disposed of the entire case upon the ground of want of power in the defendant, under its charter, to acquire stock in any other corporation, however small the amount. The decisive question was not one of a right to own and hold property, but of the construction of the general incorporation law of the State.

The Court, nevertheless, proceeded to express the view that acquisition, by defendant, of a controlling interest in the stock of a competitor would be contrary to public policy, and that, consequently, the general incorporation act of the State, under which defendant took out its charter, should not be construed as conferring upon it power to make it.

Distilling Co. vs. The People, 156 Ills., 448, went on practically the same grounds as *People vs. The Gas Trust,* viz., that the general incorporation act, under which the Distilling Company was organized, was not broad enough to authorize a charter for buying up and controlling distillery plants that produced the bulk of all the spirits made in the country. The form of the suit was *quo warranto* to oust the Distilling Company from the right to buy and own the plants. The case turned on the construction of the incorporating act and not on the question of how much property might lawfully be under control of a single interest.

Bishop vs. American Preserves Co., 157 Ills., 284, was an instance of a combination between six companies, located in various parts of the country, for regulating sales and prices. As part of the arrangement, the six companies took out a charter, under the laws of West Virginia, combining them into one company; but each individual company seems to have thereafter maintained its existence and identity as before.

Harding vs. American Glucose Co., 182 Ills., 553, was a bill filed by a stockholder against a corporation and its officers on the ground that the plant and business were about to be sold out for an inadequate price to a New Jersey corporation, organized for the alleged purpose of buying up all the glucose plants of the country and establishing a monopoly in the manufacture and sale of glucose. The Court seems to have put its decision upon the express intention to monopolize. The evidence in the case sustained the inference that the express purpose of the promoters of the American Glucose Company was to control, if not to monopolize, the entire glucose business of the country. The Court held the accomplishment of such an object by purchase of the plants would be equally unlawful as doing so by means of a trust merely to hold and manage them. No precedent for this ruling was cited. None can be found. The Court exercised a plain act of legislative power. The case stands alone in holding that purchases of property can never fall within the rule of the common law and the existing statutes aimed at restraints of trade, and that a transfer of absolute title is illegal if its effect would be to reduce competition.

The Glucose case is flatly antagonized by the more

recent case in the State of Texas, *State vs. Shippers' Compress & Warehouse Co. (67 S. W. Rep., 1049; 69 S. W. Rep., 58);* also by a case in the State of New Jersey, decided about the same time *(Trenton Potteries Co. vs. Oliphant, 58 N. J. Equity, 507).*

The Texas case arose under a State law prohibiting monopolies. The defendant had bought, and was operating, a large number of plants used in compressing cotton for shipment. The State claimed that a monopoly of the business in the hands of the defendant, or, at least, a very dangerous restraint of trade in that line, had resulted, but the Court held :

> " One may, if financially able, acquire much or all the property of a given class, provided the purchase was not made for the purpose of imposing or accomplishing harmful results to the public ; and from a bare exercise of the privilege it cannot be inferred that the purpose and intention was to create a monopoly, or that a monopoly necessarily results from such extensive acquisition."

The *Trenton Potteries* case was between private litigants. Eight manufacturing concerns, seven of them located in Trenton, practically monopolized the production of certain sanitary articles in general use throughout the country. To avoid excessive competition between themselves for this trade, the eight concerns had formed an association to regulate prices in which association the vote of a majority of the members controlled. The plaintiff acquired five out of the eight, which gave it a controlling voice in the association. The defendants had sold one of the plants, which the plaintiff got, and gave with it an agreement not to afterwards engage in the same business within a designated territory. This suit was to enforce that agreement. The defendants claimed that the real ob-

ject of the purchase, which the agreement accompanied, was to combine the control of the business of the country in the line of goods produced, and that, consequently, the agreement was an illegal restraint of trade. The court of last resort held to the contrary, among other things, saying:

> "While contracts to restrain or limit competition in the production of that ware may be repugnant to the public interest, such a restraint or limit may result from contracts which the courts are bound to enforce.
>
> "A person engaged in any manufacture or trade, having the right to acquire and possess property, and to do with it what he chooses, may lawfully buy the business of any of his competitors. His first purchase would at once diminish competition. If he continued to purchase, each succeeding transaction would remove another competitor. If his capital was large enough to enable him to buy the business of all competitors, the last purchase would completely exclude competition, at least for a time. But, in the absence of legislative restriction (if such could be imposed), upon the acquisition of such property, and its use when so acquired, courts could impose no limitation.
>
> "They would be obliged to enforce such contracts, notwithstanding the effect was to diminish, or even to exclude competition."
>
> pp. 523–4.

> "But appellant is a corporation, and not an individual. Corporations, however, may lawfully do any acts within the corporate powers conferred on them by legislative grant. Under our liberal corporations laws, corporate authority may be acquired by aggregations of individuals, organized as prescribed, to engage in and carry on almost every conceivable manufacture or trade.
>
> "Such corporations are empowered to purchase, hold and use property appropriate to their business. They may also purchase and hold the stock of other corporations. Under such powers, it is obvious that a corporation may purchase the

> plants and business of competing individuals and concerns. * * * It follows that a corporation empowered to carry on a particular business, may lawfully purchase the plants and for a time, at least, destroy competition. Contracts for such purchases cannot be refused enforcement."
>
> pp. 524–5.

The second clause of Section 1 is not material. That paragraph applies exclusively to corporations organized or existing under the laws of this state; *i. e.*, the State of Minnesota. The Securities Company was organized and exists solely under laws of the State of New Jersey.

The Northern Pacific Railway Company was organized and exists solely under the laws of the State of Wisconsin. It derives its permission to own and operate railways lying within the State of Minnesota from the latter State; but that permission has nothing to do with its organization or existence as a corporation. Its organization or existence as a corporation would not in the least be affected, if such permission by the State of Minnesota should be withdrawn. Of the three corporation defendants, the Great Northern Railway Company alone answers the description of corporations of which the legislature in that paragraph speaks.

As a matter of fact, nobody has done any of the things prohibited by the paragraph; but it is essential here, only to inquire if Great Northern has done some of them.

What the paragraph forbids is that a corporation of the state should thereafter "unite in any manner, *with any other corporation wheresoever created, or with any individual.*" Exactly what Great Northern has done in the series of transactions under review, has been

proven. It has entered upon its stock transfer books notation of the fact that sundry of its stockholders, owning about $50,000,000 of its stock out of a total of $125,000,000, have sold their shares to Northern Securities Company, and has recognized the latter as successor of the sellers in the ownership of the shares sold. It might also be conceded, though not proven, that the Great Northern Company has been informed of the other purchases by Northern Securities, and has not objected to any of the sales of its shares to the latter. By entering upon its stock books transfers of its shares which its stockholders, without its request, or even suggestion, have made to others, a corporation does not "unite" with anybody. It merely gives that recognition to transactions, exclusively between others, which its charter, and the general laws governing it, require. The meaning of the term "unite," in this clause, can cover only some action by the company, in its corporate capacity, by which it directly enters into a combination. Furthermore, the act requires the arrangement to be one through which the corporation parts with some of its rights, franchises or privileges, or with some "control" over its business. The "control" here meant, cannot be that resulting from mere ownership of stock. The paragraph does not mention stock or stockholders. It leaves absolute and unconditional sales and purchases of stock precisely as they stood before the passage of the act, by omitting any reference to the subject, or to stockholders. That being so, the corporation must remain in the position toward changes in ownership of its stock, where its charter and the general laws have put it. The Legislature could not have meant it to be unlawful or criminal for a corporation to enter upon

its stock books a transfer which it did not prohibit the seller from making, or the purchaser from taking. By registering such transfers, and thereafter recognizing the rights of the purchaser, the corporation does not "unite" with him in any of the ways, nor for any of the purposes, nor with any of the results, described in the paragraph. It does not "unite" with him at all. It merely accepts an an accomplished fact a transaction between others, not prohibited by any statute, and in which it has taken no part.

Furthermore, even in cases falling within the State Anti-Trust Act, equity would have no jurisdiction. Every disobedience of the act is made by it a crime, and the remedies are specified in the act. They are:

When the violator is a natural person, fine and imprisonment; when the violator is a corporation, for some violations fines and for others forfeiture of franchises; prohibition to the State courts to enforce claims growing out of violations. No right to injunction is given by the act. It is well established that, in absence of statute, an injunction will not issue to restrain the commission of a crime.

The Act of 1874.

[For the words of this act see p. 71.]

This act prohibits certain specifically and accurately designated persons from doing certain specifically and accurately described things with certain other specifically and accurately described persons.

The persons *with* whom the specified things are prohibited to be done all belong to a single, well-known and well-understood class, always able to be identified with perfect certainty, viz., *railroad corporations.*

The persons *by* whom the specified things are prohibited to be done all belong to one or another of the following well-known and well-understood classes, also able to be identified with perfect certainty, viz. :

(a) Railroad corporations.

(b) Lessees of railroad corporations.

(c) Purchasers of railroad corporations.

(d) Managers of railroad corporations.

(e) Officers of railroad corporations.

The things which the act prohibits also fall into three well-known, well-understood, and always easily recognizable classes, viz. :

(a) To *consolidate* the stock, property or franchises of one railroad corporation with another railroad corporation having a parallel or competing line.

(b) To *lease or purchase* the works or franchises of any other corporation having a parallel or competing line.

(c) To *control in any way*, any other railroad corporation having a parallel or competing line.

The Act of 1881.

[For the words of this act see p. 71.]

Probably the Act of 1881 is rightfully to be regarded as an intended revision of the Act of 1874, and, consequently, as a supersession and implied repeal of the earlier act. It revised and consolidated the existing laws upon the subjects treated, and enlarged their scope.

The changes in substance made by the Act of 1881, are:

(a) The *persons* prohibited are *reduced* to a single class, viz., *railroad corporations.*

(b) The *things* prohibited are *enlarged* to include acquisition or control of the *stock or property* of a railroad corporation which owns or controls a parallel or competing line.

But assuming that both acts are in force, and that the later one has merely enlarged the earlier, in the matters where their substance differs, neither is applicable to this case.

To make either applicable, one of the classes of persons prohibited by the acts from doing the things specified in the acts must have done one or more of those specified things.

Both conditions must concur or the acts do not apply.

The things prohibited to be done are all, in themselves, matters of ordinary business, and absolutely harmless. In themselves, they are even commendable, and favorable to the public interest, because they encourage and stimulate the use of private capital for the creation and operation of the transportation facilities on which the material life of the country absolutely depends. If any feature of the public policy of the country has been definitely established, it is, that the transportation systems should be created and operated with private capital. To attract capital, the investment must be made readily salable and transferable. Few would knowingly put their means into property of a form that could not be freely sold. This fact has always been well understood by all legis-

latures dealing with the subject, and it has been settled usage in all the states to facilitate, rather than to hinder, transfers of railway investments, whether such transfers take the form of leases, deeds or consolidations of properties, or sales of corporate securities. Furthermore, the policy of all States, including the State of Minnesota, has always favored large aggregations of railway properties and securities. From the beginning of legislation on these subjects in territorial times, up to the present, the State of Minnesota has provided all legal facilities for aggregations of railway mileage big enough to extend throughout the country, and for concentrating the entire capital stock of the biggest system in the hands of a single person, with the possible exception of one share for each director, to qualify him for office. Even that exception is improbable. Not a line nor a letter has ever appeared in a Minnesota statute showing the smallest desire of the Legislature to favor the dispersion of railway ownership or investments, or even hinting that a limit on the amount of stock or bonds of railways held by a single owner might be for public advantage.

These acts of 1874 and 1881 must, therefore, be confined, in their restrictive effect, to such limitations on transfers of railway properties and securities as they actually contain, leaving all other transfers of railway stocks or properties to the same freedom that they have always been accorded by the settled policy of the State.

If the persons specified in the acts do things not enumerated therein, or if any persons *not* specified in the acts do things enumerated therein, in either case the acts do not apply, and the things done are lawful.

It is not claimed here that any officer of the North-

ern Pacific Railway Company is also an officer of the Great Northern Railway Company, nor that either railway company has leased or purchased any property from the other, or any security issued by it, or exercises any control over it, or its property or franchises. There is no evidence that either Northern Pacific or Great Northern has done any act connected with any matter of which the State complains, except to enter upon its transfer books transfers of shares to the Securities Company, or to persons designated by it, that the owners of record have directed to be made. Such entries of transfers were required by the charter and by-laws of each company.

Northen Pacific and Great Northern have not, either formally or informally, consolidated their stocks, properties or franchises. Each corporation, each item of its property or franchises, each share of its corporate stock, is as separate and distinct from those of the other as they have ever been. Consequently, neither of the two railway companies has done any of the things forbidden by the Acts of 1874 and 1881.

If Securities Company be not one of the persons designated in the acts, or if it has not done some of the things prohibited by the acts, in either case the acts do not apply to what has been done.

Firstly, the prohibition of the acts is exclusively directed at *railroad* corporations, *managers* of *railroad* corporations, *officers* of *railroad* corporations, *purchasers and lessees* of *railroad* corporations.

Securities Company is clearly not an officer of any railroad corporation, nor the purchaser or lessee of any, or of the property of any. It is not the manager of any railroad corporation. It is not a railroad corporation itself.

The Securities Company being a corporation, its character and the nature of its powers are to be ascertained from its charter; *i. e.*, from the Certificate of Incorporation. The powers conferred on this company, by its Certificate of Incorporation, and by the laws of the State of New Jersey, are limited to buying, owning, selling, voting upon and collecting the revenue from the securities of other companies; to aiding in any manner any other company whose securities it holds; to doing any acts or things designed to protect, preserve, improve or enhance the value of any such securities held by it; and to holding such real or personal property as may be necessary for the transaction of its business. The certificate does not empower it to own, hold or manage railways, mines, factories, stores, or farms, nor to direct the management of any other company. There is no evidence that it has ever claimed or sought to exercise any such power. On the contrary, the letter written by Mr. Hill to an enquiring stockholder of Great Northern, on November 30, 1901, and before any suit was brought against the company by the State, expressly disclaimed the possession of any such power.

The general words of paragraph 4 of the enumeration of powers:

> "To aid in any manner any corporation or association of whose bonds, evidences of indebtedness, or stock, are held by the corporation; and to do any acts or things designed to protect, preserve, improve or enhance the value of any such bonds, or other evidences of indebtedness, or securities or stock,"

were not meant to, and do not, empower Securities Company to engage in any class of business materially different from that specifically described in the

preceding subdivision of the same article. They merely empower it to do such acts as advancing money, endorsing and guaranteeing paper, becoming surety, and the like. The power to hold real and personal property was also meant to be, and construed with the slightest degree of fairness is, limited to such as the transactions of the company's business, specified in the first four subdivisions of Article 3, should make necessary or convenient; such as office buildings and property acquired in legal proceedings for collection of indebtedness owing to the company. The Securities Company is, therefore, not a "Railroad Corporation," but a mere *financial company*, having no power or authority save such as are commonly held and exercised by financial companies the world over.

While the term "Railroad Corporation" has probably never been the subject of legislative definition, it has long been in common use, and its meaning has, from the beginning of its use, been perfectly well understood. It is employed to designate corporations that own or operate railroads, or both; and is applicable to such only.

The ownership of stock in a company that owns or operates railroads does not make its owner a "Railroad Corporation." Nobody would ever think of designating a stockholder in a banking company a "Banking Corporation," nor a stockholder in an insurance company an "Insurance Corporation," even if the stockholder happened to be a corporation. No more is Securities Company a "Manager" of railroad corporations. This term, as used in connection with railroads, has also been well understood since long before 1881, or even 1874. It has never been used to describe the stockholders of a railroad company, or any

fraction of them, whether major or minor. A thousand persons, together holding a majority, or even all, of the stock of a corporation, would never be designated the company's "Managers." They would always be spoken of as its "stockholders." The same would be as true of a single person or company that happened to own a majority. He or it would still be called "stockholder" and not "Manager."

In Pullman's Palace Car Co. vs. Mo. Pac. Ry. Co., this Court expressly recognized that fact, and said: "In a sense the stockholders of a corporation own its property, but they are not managers of its business."

The sense in which the Legislature used the term "managers of any railroad corporation," in the Act of 1874, is shown by one of the things required to be declared in articles incorporating such companies under the general laws. Since the beginning of the state's existence, it has been necessary to set forth in such articles: "The names of the first board of directors, *and in* "*what officers or persons the government of the corpora-*" *tion and the management of its affairs shall be vested,*" *and when the same shall be elected*" (*Gen. Stats. 1866, Chap. 34, Sec. 3*).

The "managers" of any corporation must, wherever used, mean "the officers and persons in whom the "management of its affairs are vested," and, in corporations formed under the general laws, these can never be the stockholders; for they are to be elected; and the term "election" could not apply to stockholders.

Northern Pacific and Great Northern were incorporated by special laws; and each charter expressly designates who shall be the "managers" of the corporation. They are not the stockholders in either

case. On this point, the Northern Pacific charter reads:

> "All of the affairs of said company shall be managed by a board of directors, who shall be stockholders, and who are hereby invested with all the powers of the corporation, save as hereinafter provided" (Record, p. 1145, fol. 4563).

The Great Northern charter provides:

> "And all the affairs and business of said company shall be conducted by, or under the direction of the board of directors, and they are authorized, for the purposes specified in this act, to make and establish regulations and By-Laws, and to do all things necessary to be done, and not inconsistent with the Constitution and laws of the United States, or with the laws of this territory, or this act."
>
> Ev., p. 1100, fol. 4381.

Every question in this case should be considered, without mental confusion about what has been done. That has been simply this:

The Northern Securities Company being owner of a majority of Northern Pacific stock, but being only one out of about 400 Northern Pacific stockholders, proceeded to buy a majority of Great Northern stock from about 1,200 out of about 1,900 individual holders of it. Whatever "putting together" of the two stocks has been done, has been exclusively by the Securities Company. The only "putting together" of the two stocks has been their purchase by one owner. Neither railroad company, nor any board of officers of either, has put these stocks together, because none of them did any of the buying, which alone could be the unlawful act, if any such were here committed. Furthermore, if it could be conceived, that a sale of the stocks of two competing companies to a

single interest, could not lawfully be promoted by the managers of the companies, still, when the sale had actually been made, the title of the purchaser would not be invalid by reason of such promotion, if the buyer were not prohibited by law from owning them in any way.

Therefore, viewed from any possible standpoint, none of the "managers" of either of these railway companies has consolidated any of their stock, property or franchises.

Purchase and ownership of part of the stock in a corporation, even the majority, cannot be purchase or ownership of the corporation itself. If it could, what would become of the interests represented by the residue of the stock? What would the minority own? The whole body of stockholders, and a part of them less than the whole, could not both own the corporation at the same time. Either the majority stock does not own the corporation, or the minority owns nothing in it. A "purchase" is necessarily followed by ownership. Any transaction not so resulting could not be a "purchase"; it must be something else.

If Northern Securities Company now owns the Northern Pacific corporation, what has become of the interests of the minority stockholders in that corporation? How and when did they lose their rights? They must have lost their rights, if Northern Securities has become owner of the corporation.

When the Northern Securities Company bought a majority of Northern Pacific stock, it undoubtedly purchased control of the Northern Pacific corporation; but it did not purchase the corporation itself.

A purchase of a corporation could be made only by purchase of the franchises from the incorporators,

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before the issuance of stock, or by purchase of the entire capital stock, when issued.

The Minnesota Statutes name the purchaser of the *corporation*. They do not mention control any more than stockholders. If the Legislature had meant stockholders, or meant control of corporations, it would have said so.

There has never been any usage of speech in this country that has extended the meaning of the term "purchaser of a corporation" to the buyer of part of the corporation's stock. The term may, in some instances, have been applied in that way; but, if so, they have been instances of mere loose and colloquial expression, where the correct use of words was neither important nor attempted. Such mere colloquialisms are not to be considered in studying the meaning of words. They do not fix their meaning for any purpose. Especially, they do not fix it, when the question is that of the construction of statutes. It cannot be presumed that the Legislature has regarded them, in selecting the language for its enactments.

Clearly, therefore, the Securities Company is neither a railroad corporation, nor an officer, manager, lessee, nor purchaser of any. Being neither of these, it is not one of those who have been forbidden by the acts of 1874 and 1881 to do the things specified in those acts. The acts do not apply to it. Other classes of persons have not been prohibited from doing these things, and, therefore, may continue to do any of them at pleasure.

The fact that Securities Company held the majority of the stock of Northern Pacific, when it bought enough Great Northern stock to give it a majority of that also, makes no difference. Ownership by it of a majority, or even of all, the stock of the Northern Pacific could

not make it the Northern Pacific Railway Company, nor a railroad corporation at all. The Northern Pacific Railway Company has continued to own and operate the Northern Pacific Railway as before. It remains the "Railroad Corporation." A corporation and its stockholders are absolutely different entities and personalities, under all circumstances, regardless of the number of stockholders, or how much any one of them holds. Even if they were but a solitary stockholder, this would be just as true; his act, however ample in form, would not be the act of the corporation, but of *himself*, as an individual. This has often been held, and no case has been found that dissents from it. In *Baldwin vs. Canfield, 26 Minn., 43*, the Supreme Court of the State of Minnesota held that the owner of the entire capital stock of a corporation is so distinct from the corporation itself, that his deed of the real property is wholly inoperative, and passes no interest.

In *Pullman's Palace Car Co. vs. Mo. Pac. Ry. Co., 115 U. S., 585*, the parties had made a contract whereby the car company should have the right to furnish, for the use of the railway company, drawing-room, or parlor and sleeping cars, on all passenger trains of the railway company, and over its entire line of railway, "*and on all roads which it controls, or may hereafter control, by ownership, lease or otherwise.*" With this contract in force, the Mo. Pac. Ry. Co. acquired all but 1,195 of the total 220,682 shares of the stock of the Iron Mountain Ry. Co., and the two roads were operated under the same general management. This Court held that these facts did not give the Mo. Pac. Ry. Co. "control" over the railways of the Iron Mountain Ry. Co.

Among other things, the Court said :

"We are also of opinion that the railroad of the St. L., I. M. & S. is not controlled by the present M. P. in such a way as to require that company to haul the Pullman cars over it, if the contract is binding on the new company to the same extent as it would be on the old." * * *

"Confessedly, the St. L., I. M. & S. keeps its own corporate organization. It operates its own road. It has its own officers and makes its own bargains. The Mo. Pac. owns all, or nearly all, its stock, and in that way can determine who shall constitute its board of directors, but there the power of that company over the management stops. The board, when elected, has controlling authority, and for its doings is not necessarily answerable to the Mo. Pac. Co. The two roads are substantially owned by the same persons and operated in the same interest, but that of the St. L., I. M. Co. is, in no legal sense, controlled by the Mo. P. Co."

* * * * * *

"The Mo. P. has bought the stock of the St. L. & I. M., and has effected a satisfactory election of directors, but that is all. *It has all the advantages of a control of the road, but that is not, in law, the control itself.* Practically it may control the company, but the company alone controls the road. *In a sense, the stockholders of a corporotion own its property, but they are not the managers of its business or in the immediate control of its affairs.* Ordinarily, they elect the governing body of the corporation, and that body controls its property. The directors now control the road through their own agents and executive officers, and these agents and officers are in no way under the direction of the Mo. P. Co. * * * Its rights and powers are those of a stockholder only. It is not the corporation, in the sense of that term as applied to the management of the corporate business, or the control of the corporate property" (pp. 596-7).

In the subsequent case, *Porter vs. Pittsburg Bessemer Steel Co., 120 U. S., 649*, the same Court said:

> "The mere fact that Crawford owns a majority of the stock does not give him legal control of the company; nor from such ownership can be drawn the legal inference that he dominated the Board of Directors."
>
> The Court cited Pullman's Palace Car Co. vs. Mo. Pac. Ry. Co. with approval.

When, therefore, a statute merely prohibits the doing of specified acts by a corporation, the prohibition cannot extend to the stockholders, because they are persons totally distinct from the corporation.

This proposition has also been established by the this Court in two other cases; in one of which the Court considered these very statutes of the State of Minnesota, and in the other a provision of the constitution of the State of Kentucky, identical with the Minnesota statutes in substance and almost in words.

> Pearsall vs. Great Northern Ry. Co., 161 U. S., 646.
>
> State of Kentucky vs. Louisville & Nashville Ry. Co., 161 U. S., 676.

The Pearsall case was a suit by a stockholder of the Great Northern Railway Company, against the company, to restrain it from carrying out a contract made by its president, on the one part, and the representatives of the securities of the Northern Pacific Railroad Company, then insolvent and in the hands of receivers, on the other. By the terms of the contract the mortgages of the Northern Pacific Company were to be foreclosed and the properties turned over to a new company, which should issue its own bonds and stocks in payment therefor. The bonds were to be guaranteed by the Great Northern Railway Company, in con-

sideration for which one-half the new stock was to be transferred to the stockholders of the latter or to a trustee for their benefit.

The Great Northern Railway Company was incorporated by special acts of Legislature of Minnesota, that expressly authorized it to consolidate with any other railroad company withing or without the State; and, by inference, to do preparatory acts for such consolidation, such as the purchase of the other company's stock.

The terms of the contract admitted a construction, that the one-half of the new stock going to the stockholders of the Great Northern Railway Company, was to go to them, not as individuals and by separate ownership, but collectively and as a body, so that the owners of this stock would always be the holders of Great Northern stock, for the time being, in proportion to their respective holdings of the latter stock. Such an arrangement would necessarily be a direct ownership of the new stock by the Great Northern Railway Company itself. The Court placed that construction on the contract, and consequently regarded it as an expressed sale to the latter company.

In addition, the entire consideration for the transfer of the stock was to be paid by the Great Northern Railway Company itself. Under the long established rule of law, that where the price of a purchase is paid by one man, and the title is taken in the name of a third, the payer of the price becomes the real owner of the property, the ownership of the stock would vest in the Great Northern Railway Company, by necessary implication, even if the contract could not be deemed so to expressly provide. Either way, the owner of the stock would be the Great Northern Railway

Company, as a corporation. The dominating question in the case was whether the subsequent general laws did, or constitutionally could, repeal the prior special charter. This question the decision of the Court answered in the affirmative; but also said:

> "*Doubtless these stockholders could legally acquire, by individual purchase, a majority, and even the whole, of the stock of the reorganized company; and thus possibly obtain its ultimate control; but the companies would still remain separate corporations, with no interest, as such, in common.*"
> (p. 671).

Shortly after the decision of the Pearsall case, and at the same term of court, the *State of Kentucky vs. Louisville and Nashville Rd. Co.*, was decided.

This suit was brought by the State which had incorporated the defendant, to restrain the latter from purchasing, at foreclosure sale, the railway of another company, deemed parallel and competing, lying in Kentucky, and in one or more adjacent States.

The decision was for the State; but, in course of its opinion, the Court said:

> "*It is true, as was observed in Pearsall vs. Great Northern Railway Company, that the stockholders of the Louisville & Nashville Rd. Co. may individually become the purchasers of the Chesapeake Co., at a judicial sale, and may organize a new corporation, but it would still be a corporation separate and distinct from that of the Louisville & Nashville Company. The inhibition of the Constitution is not against the sale to individuals, though they may chance to be stockholders in a competing line; but against the acquisition by a railway, in any form, of a parallel and competing line.*"
> P. 693.

Admittedly, the proposition contained in the two quotations from the Pearsall case and the Louisville

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and Nashville case was not indispensable to the decision of the cases. Still, these expressions were much more than mere dicta, and are entitled to all the weight of solemn judicial declarations of a legal principle relating to the State statutes.

In the first place, the announcement of the rule was deliberately repeated by the Court. Had it been stated but once—in the Pearsall case, for instance—and been omitted from the later case, there might be ground for saying, that it was the mere personal view of the eminent Judge who spoke for the majority, which the concurring Judges are not presumed to have noticed, and which they were permitted to pass over in silence.

The chief difference between those parts of a Court's opinion that state the propositions necessary for the support of the judgment reached and the rest of the document, as rules for subsequent decision, is, that the former parts are assumed to have had the attention of all concurring Judges, while the latter may have escaped the notice of any save the writer of the opinion herself. In this instance, that assumption could not possibly be true. The very fact and the circumstance of the repetition must have involved the attention of all the Judges, and the further fact that none expressed disagreement from the proposition in either case, shows that all must have assented to it, while some did dissent from other parts of the opinions and judgments pronounced. Such evident care on the part of the Court to suggest and reiterate that the State prohibitions are limited to the single designated class of corporations, and do not extend to natural persons or other corporations, must have come from the Court's desire to state in a complete way and fully the

rule of law it was applying to the facts in the respective cases. The Court might have cut the complete rule defining legal capacity to buy railway properties and stocks into fragments and selected only the part deemed by it necessary for the decision of the case, leaving the other parts to be discovered at their peril by those thereafter contemplating such purchases. The Court did not proceed in that way, but took care to announce the new rule, controlling matters of tremendous business and financial consequence, in a form much more valuable to the public, as a guide for what might and might not be done.

The Pearsall case and the Louisville and Nashville case are direct authorities, that such purchases of stocks in railroad corporations, as have been made here, are not forbidden by the Minnesota Acts of 1874 and 1881.

These cases say that the stockholders of one corporation may acquire the stock—and all the stock—of a competing corporation, by "individual purchases." What kind of purchases are those? are they more than purchases of shares which shall be owned by the purchasing stockholder, and not by the whole body of stockholders?

The number of stockholders in a railroad corporation, who buy the property or securities of another, cannot be important. This Court attached no importance to it. The Court did not stop to inquire the number of Great Northern stockholders before saying that they might lawfully buy Northern Pacific stock, nor how many Louisville and Nashville stockholders there were before saying that they might buy the railways of the Chesapeake Co. For all that appeared in either case there may not have been five stockholders in either the

Great Northern or in Louisville and Nashville. Neither can it be important whether the stockholders are natural persons or corporations.

The number of stockholders or their character was not the question there and is not the question here. The question both there and here is, whether statutes forbidding "railroad corporations" to do specified things also forbid their stockholders to do them as individuals. No answer different from what the Court gave could be reasonable. A command to a designated person, or to a designated class of persons, is solely a command to that person or that class, and not one to somebody else.

The State of Pennsylvania was a pioneer in this sort of railroad regulation. There the prohibition was placed in the Constitution. Its words have been almost literally copied into the Acts of Minnesota and the Constitution of Kentucky. Two cases arose under the Pennsylvania inhibition very soon after it went into effect.

Commonwealth vs. South Penn. R. R. Co., 1 P. C. C. Rep., 214; affirmed 7 At. Rep., 368.

Commonwealth vs. Beach Creek R. R. Co., 1 Penn. C. C., 223; affirmed 7 At. Rep., 374.

Neither of these cases antagonizes what the Supreme Court said in the Pearsall case, or in the Louisville and Nashville case, nor any proposition advanced by the defendants here. On the other hand, while those cases went off on grounds not existing in this case, the Pennsylvania Courts plainly recognize that a corporation is distinct from its stockholders, under such enactments.

In the South Penn. case a railroad had been projected and put under construction, to run from Pittsburgh east, and, when completed, to be operated in competition with the Pennsylvania Railroad through the same general territory, comprising the whole southern part of the State.

The officers of the Pennsylvania Railroad Company made an agreement with a representative of the stock and bond holdings in the South Penn. Co., whereby all the stock of that company was to be transferred, and to be paid for in bonds to be guaranteed by the Pennsylvania R. R. Co.

The report of the case does not clearly show to whom the South Penn. stock was to be transferred, nor the company whose bonds were to be delivered in payment. The real buyer and paymaster, however, was indisputably the Pennsylvania Railroad Co.

The managers of both sides of the transaction admitted, as witnesses, that the purpose of the trade was to relieve the Pennsylvania Railroad from the competition of the South Penn.

The Court took precisely the position afterward taken by this Court in the Pearsall case; viz., that it mattered not to what name the South Penn. stock might be transferred, in carrying out the trade. Payment of the consideration by the Pennsylvania R. R. Co. would give that company ownership of the stock and the right to manage the same, and the certificate holder would merely be its trustee. Consequently, the case stood as if the stock were to be transferred directly to the Pennsylvania Railroad Company. The case was one of the purchase by one company of all the stock of another owning a parallel and competing line. The Court distinguished

the South Penn. case from the *Pullman's Palace Car Co. Mo. Pac. Ry. Co.*, then recently decided, by holding that what the Pennsylvania Constitution forbids is the control of a *company;* not the control of a *railroad.*

The Court reasoned a *railway* is controlled by the company that owns it, and not by that company's stockholders; but the stockholders, while not controlling the railway, do control the company that controls the railway. The correctness of the decision in the Pullman Palace Car case was not denied.

The Beech Creek case was precisely similar to the South Pennsylvania case in everything going to the substance.

Again, the stock of a railway parallel and competing with portions of the Pennsylvania Railroad's system, was to be transferred to a third party, for a consideration coming exclusively from the Pennsylvania Railroad Company. As before, the Court held that the source of the consideration fixes the ownership of a thing bought. This point being established, the invalidity of the purchase followed as a matter of necessity.

There is not a word, however, in the opinion of either of these Pennsylvania cases, hinting that the stockholders of the Pennsylvania Railroad Company could not have bought the stocks which the company itself was held incapable of buying. In the Beech Creek case it appeared that the Pennsylvania Railroad Company owned a controlling interest in the stock of the Northern Central, which was to take the transfer of the Beech Creek stock; but the Court ignored that fact in reaching its conclusions. It was unimportant, because the Northern Central would not, in law, have been the

purchaser. Besides, the Court expressly conceded the distinction between a corporation and its stockholders, by conceding that the latter do not control the property of the former.

The Court said nothing indicating that ownership of a controlling interest in the stock of the transferee, by the Pennsylvania Railroad Company, would taint the transaction. The choice of a totally different ground on which to place its decision shows that the Court gave no weight to ownership of the transferee's stock. If the admitted ownership of that stock by the Pennsylvania Railroad Company could have cut any figure, the Court would undoubtedly have made that fact one of the grounds of its decision, but it did not.

A more recent case in the Supreme Court of that State, again emphasized the distinction between corporations and their stockholders, under statutes of this class.

Commonwealth vs. New York, Lake Erie and Western Ry. Co., 132 Pa. St., 591.

Information exhibited by Attorney General for *quo warranto* directed to defendant, to forfeit title to certain coal lands in Elk County claimed to be held in violation of the company's charter and the State law. Defendant was a corporation of the State of New York. A Pennsylvania statute, passed in 1855, enacted: "That no corporation other than such as shall have "been incorporated under the laws of this state, nor "shall any foreign government, potentate, or power, "hereafter acquire and hold any real estate within this "commonwealth, directly in the coporate name, or by "or through any trustee or device whatsoever, unless "specially authorized to hold such property by the "laws of this commonwealth."

With this act in force, the President of the Erie Railway Company bought for the company large tracts of coal lands lying in the State of Pennsylvania, which he paid for with the company's money, and caused to be conveyed to himself as trustee. Afterward, to avoid the operation of the act of 1855, the company bought the charter of a Pennsylvania mining corporation authorized by the laws of the State to own lands, retained for itself all the shares except a few needed for qualifying directors, and caused the title to the lands to be conveyed to the mining company.

Held, This was not a "device" to enable the railroad company to hold title to the lands in spite of the statute, nor in any way unlawful.

In the State of Georgia the Constitution contains the following clause:

> "The General Assembly of this state shall have no power to authorize any corporation to buy shares or stock in any other corporation in this state or elsewhere, or to make any contract or agreement whatever with any such corporation which may have the effect, or be intended to have the effect, to defeat or lessen competition in their respective businesses or to encourage monopoly; and all such contracts and agreements shall be illegal and void."
>
> Const. Ga., Art. 4, Sec. 2, Par. 4.

With this provision in force, a majority of the stock of the Central Railroad and Banking Co. of Georgia, owning and operating about 2,400 miles of railway in that State and steamship lines between the seaports of Georgia and those of the Eastern Atlantic States, was acquired by the Richmond Terminal Co., a corporation of the State of Virginia.

The Terminal Co. at the same time owned a majority of the stocks of the Richmond and Danville R. R.

Co. and the East Tennessee, Virginia and Georgia R. R. Co., corporations of States other than Georgia, but operating railways in that State and elsewhere in competition with the transportation lines of the Central of Georgia. The latter company became insolvent and a receiver of its properties was appointed by the United States Circuit Court for the Southern District of Georgia.

That Court ordered the Receiver to convene a meeting of the company's stockholders for specified corporate purposes, and at the meeting to exclude the stock acquired by the Richmond Terminal Co. from voting, on the ground that it had been acquired, and was being owned, by the Terminal Co. in violation of the above quoted clause of the Georgia Constitution.

On behalf of this stock, a motion was made before Mr. District Judge SPEER to vacate the order of exclusion; but it was denied, his Honor, among other things, saying:

> "It is not difficult to perceive that a combination of corporations which produces a condition so inequitable cannot be sanctioned by the law. We believe that transactions of this character are within the spirit, if not within the letter, of the Act of Congress known as the 'Sherman Anti-Trust Law.' It certainly is, as we have seen, obnoxious to the law of Georgia, and it was certainly as obnoxious to the common law" (Opinion, p. 346).
>
> *Clarke vs. Terminal Railway & Warehouse Co., 50 Fed. Rep., 338.*

The matter came before Mr. Justice JACKSON, on final hearing, who disapproved of Judge SPEER's ruling in this particular, and, in the course of an oral opinion, taken down by a stenographer for counsel in the case, said:

"The question under consideration is whether that injunction on the 42,200 shares held by the Central Trust Company, under the circumstances familiar to you, and which I will recite in a moment, whether those shares are entitled to vote in an election for directors of the Central Railroad Company. Certain individuals forming a syndicate buy up 40,000 shares. The Terminal Company organized, and chartered regularly by a sister state, with express authority to purchase and hold stocks and bonds in any of the railroads with the designated territory, within the designated state, has purchased 42,200 shares. Is there any law of Georgia that forbids that purchase? Was there any constitutional provision of Georgia that nullified that purchase, or rendered it illegal—a purchase made not in the State of Georgia, a contract made not with any Georgia corporation or Georgia individuals? *Where is the constitutional provision of the State of Georgia, or its power either by legislation or constitutional provision, to prohibit a lawfully organized corporation created by the State of Virginia, with express power to own and purchase stocks and bonds, where is the power in the State of Georgia, in her legislature or her constitution, to prohibit the purchase of that lawful property, issued and created under our own laws, and put out before the world as salable? It does not exist.* I concede that the State of Georgia may put in limitations and restrictions upon corporations in respect to the amount of property they shall acquire; in respect to the amount of stock they may authorize a corporation to issue; *but I say that when that corporation has issued that stock, when it goes abroad as property, there is no power in this land that can deny to the owner the right to sell it, nor deny to the individual the right to buy it; and, if a corporation is created by any state with power to own and purchase stock, that that corporctian is entitled to buy that stock, and that Georgia in her constitution and her legislature could not prohibit it.*"

* * * * * *

"Did Georgia by her constitution undertake to pass upon the legality and validity of contracts made in Virginia, made in the State of New York?

Certainly not. If she did, she exceeded her power and jurisdiction."

* * * * * *

"For Georgia law cannot reach the transaction, Georgia law cannot deal with these stocks and inhibit their purchase and sale, and the only question in this case that ever would have given trouble would have been the power of that corporation, the Terminal Company and the North Carolina Company to have held and owned such steck, but they each had the power of the sovereigns that created them to purchase, abide and hold these stocks, and there is nothing in the constitution of Georgia or its laws to deny them their rights and interests as such holders in this property."

From the final decree an appeal was taken to the Circuit Court of Appeals, by which it was affirmed.

Same case, 62 Fed. Rep., 328.

In its opinion, the Court said:

"It is settled that the powers of corporations are derived from the sovereign that creates them. When they enter another jurisdiction and make contracts, their contracts are governed by the laws of the state in which the contracts are made. It is not shown here that any contract affecting this stock was made by these parties in Georgia, or with any Georgia corporation. It is contended that this stock should not be allowed to vote, because it is held, or its voting power is held, by another corporation which, through this stock, and its other holdings of corporations stocks, does, or may and purposes to, so control the Central Company's system and its competing system, as to 'lessen competition in their respective businesses, or to encourage monopoly.' The logical, ultimate and practical results of this contention is, that any stackholder in two Georgia corporations, or in one Georgia corporation and a corporation of another state, which may compete for interstate traffic, to be carried out of or into the State of Georgia, cannot vote his stock in both corporations; and if only one is a Georgia

corporation, he cannot vote his stock in that corporation. We say 'any stockholder,' because the logic of the contention applies as well to holders who are natural persons, as to corporations not created by the General Assembly of Georgia. * * *

"To those only very partially cognizant of the state of stockholdings in this country, the contention seems to be revolutionary. We need not question the power of Georgia to so provide, but we must inquire, has she so provided? Has the language of the constitution such self-acting, affirmative force, as to require a Court of Chancery to impose the exercise of the voting power of this stock by its present holders, at the suit of these applicants, in the case they here made? We conclude that it has not such force."

P. 334.

This case derives additional interest, if not importance, from the fact that Mr. District Justice SPEER invoked the Federal Anti-Trust Act, as well as the local constitution; and that the suggestion met no assent from either Mr. Justice JACKSON or the Circuit Court of Appeals.

It being established that the only parties here to whom the inhibitions of the Acts of 1874 and 1881 could apply are the two railway companies, and that neither has been an actor in these matters, it is unnecessary to inquire whether anybody, even the Securities Company itself, has done any of the things specified in the statutes. Still none of them has been done.

None of the parties has leased or purchased any railway or other property, or any franchise, from either railway company. No railways or other properties of the two railway companies, nor any of their franchises, have ever been consolidated. Each railway company's holdings of these things are separate

and distinct from those of the other, as they ever have been, at any time, or as they possibly could be. Neither the whole nor any part of their capital stock has been consolidated.

What did the Minnesota Legislature mean by the term "consolidation," as used in these acts?

When the acts were passed, the term had already been a long time in use, and had come to be well understood. It had been used, by the same Legislature in 1858, and again in 1866, to designate a process by which previously separate and distict corporate bodies are united in such a manner that a single body shall result. The old ones disappeared and the new one took their place. The process is prescribed and the effect specified. The statute of 1858, carried forward into the revised general statutes of 1866, was as follows:

> SEC. 36. Whenever the lines of railroad of any railroad corporation, whether organized under this title, or by virtue of a special charter, or any portion of such lines, have been or may be constructed so as to admit the passage of freight or passenger cars over any two or more of such roads, continuously, without break or interruption, *such corporations may consolidate themselves into a single corporation*, in the manner following:
>
> FIRST. Any two or more railroad corporations may, by their directors, enter into an agreement, under the corporate seal of each, for the consolidation of the said corporations, prescribing the terms and conditions thereof; the mode of carrying the same into effect; *the name of the new corporation;* the names and places of residence, and number of directors thereof; the time and place of holding the first election of directors; the number of shares of capital stock in the *new corporation;* the amount of such shares, which shall not be less than one hundred dollars; the manner of con-

verting the shares of capital stock of each of said two or more corporations into the shares of such *new corporation;* the manner of compensating stockholders in each of the *old corporations*, who refuse to convert their stock into the stock of the *new corporation;* with such other details as they may deem necessary to perfect the *consolidation* of such corporations; and such *new corporation* shall possess all the powers, rights and franchises conferred on each corporation, and be subject to all the restrictions, and perform all the duties, imposed by the provisions of this title; provided, that all stockholders in either of such corporations, who refuse to convert their stock into the stock of such *new corporation*, shall be paid at least par value for each of the shares so held by them, if they so require, previous to the consummation of said consolidation.

SECOND. Such agreement of the directors shall not be deemed to be the agreement of the said *old corporations*, until after it has been submitted to the stockholders of each of said corporations, separately, at a meeting thereof, to be called upon a notice of at least 30 days, specifying the time and place of such meeting, and the object thereof, to be addressed to each of such stockholders, when their place of residence is known, and deposited in the post-office, and published for at least three successive weeks in one newspaper, in at least one of the cities or towns in which each of said corporations has its principal place of business, and is sanctioned by such stockholders, by a vote of at least two-thirds in amount of the stockholders present at such meeting voting by ballot, either in person or by proxy, each share of capital stock being entitled to one vote; and when such agreement of the directors is so sanctioned by each of the meetings of the stockholders separately, it shall be deemed the agreement of the said old corporations.

SEC. 37. Upon making the agreement mentioned in the preceding section, in the manner required therein, and filing a duplicate or counterpart thereof in the office of the secretary of state, the said old corporations shall be merged in the new corporation provided for in such agreement, to be known by the corporate name therein mentioned;

and the details of such agreement shall be carried into effect, as provided therein.

SEC. 38. Upon the election of the first board of directors of the corporation created by said agreement, the rights and franchises of each of said old corporations, their rights and interest in and to every species of property, real, personal and mixed, and things in action, shall be deemed to be transferred to and vested in such new corporation, without any other deed or transfer; and such new corporation shall hold and enjoy the same, together with the right of way, and all other rights of property, in the same manner, and to the same extent, as if the said old corporations had continued to retain the title and transact the business of such corporation; and the titles and real estate acquired by either of said old corporations shall not be deemed to revert or be impaired by means of anything in this title contained; *provided*, that all rights of creditors, and all liens upon the property of either of said old corporations, shall be preserved unimpaired; and all the debts, liabilities and duties of either company shall thenceforth attach to such new corporation, and be enforced against the same, to the same extent, and in the same manner, as if such debts, liabilities and duties had been originally incurred by it.

SEC. 39. Any railroad corporation heretofore or hereafter incorporated, whether under the provisions of this title or by special charter, may at any time and by means of subscription to the capital of any other corporation, or otherwise, aid such corporation in the construction of its railroad for the purpose of forming a connection of said last-mentioned road with the road owned by the corporation furnishing said aid; or any railroad corporation may lease or purchase any part or all of any railroad constructed by any other corporation whose lines of road are continuous or connected with its own upon such terms and conditions as may be agreed on; or any two or more railroad corporations whose lines are so connected may enter into any arrangement for their common benefit, consistent with and calculated to promote the objects for which they were created; *provided*, that no such aid shall be furnished, nor any purchase, lease or arrangement perfected until

a meeting of the stockholders of each of said corporations has been called by the directors thereof at such time and place and in such manner as they shall designate, and the stockholders of at least two-thirds of the stock of such corporation represented at such meeting in person or by proxy, and voting thereat, assented thereto.

Gen. Stats., 1866, Ch. 34, Secs. 36, 37, 38, 39.

These clauses were in force when the Act of 1874 was passed, which was as follows :

"SECTION 1. No railroad corporation, or the lessees, purchasers or managers of any railroad corportion, shall consolidate the stock, property or franchises of such corporation with, or in any way control any other railroad corporation owning or having under its control a parallel or competing line ; nor shall any officer of such railroad corporation act as an officer of any other railroad corporation owning or having the control of a parallel or competing line ; and the question whether railroads are parallel or competing lines shall, when demanded by the party complainant, be decided by a jury as in other civil issues."

No other form of "consolidation" had been mentioned in the State enactments. The term had not been applied, in any statute of the State, to any other mode of unifying control over two corporations. It was not used again by the Minnesota Legislature, in any public act, until the passage of the Act of 1881, in which Section 3 is the statute of that year on which the State here relies. That act is as follows :

"An act to authorize any railroad company to lease, purchase, or in any way become owner of, or to control, any other railroad corporation, *or to consolidate therewith.*"

SECTION 1. Any railroad corporation, either domestic or foreign, whether organized under a gen-

eral law, or by virtue of a special charter, may lease or purchase, or in any way become owner of, or hold the stock of, any other railroad corporation, when their respective railroads can be lawfully connected and operated together so as to constitute one continuous main line, with or without branches.

SECTION 2. Any railroad corporation, whether organized under a general law, or by virtue of a special charter, of the state or territory of Minnesota, or under the laws of any other state or territory, whose lines of railroad now or hereafter constructed, within or without the state, can be lawfully connected and operated together, to constitute one continuous main line, with or without branches, so as to admit the passage of trains over them without break or interruption, *may consolidate* their stock and franchises, upon such terms as may be agreed upon, *so as to become one corporation*, by any name by them selected.

Articles stating the terms of consolidation shall be approved by each corporation, by a vote of the stockholders owning a majority of the stock, in person or by proxy, at either a regular annual meeting thereof, or at a special meeting called for that purpose, by a notice of at least thirty (30) days, stating the object of such meeting, to be addressed to each of such stockholders, when their place of residence is known, and deposited in the post office and published for at least three (3) consecutive weeks in one newspaper, in at least one of the cities or towns in which each of said corporations has its principal business office, or by consent in writing of a majority of such stockholders annexed to such articles ; a copy of such articles of consolidation, and of the record of such approval, or of such consent, accompanied by lists of the stockholders of said corporation, and the number of shares held by each, duly certified by their respective presidents and secretaries, with the respective corporate seals thereto affixed of said corporations shall be filed for record in the office of the Secretary of State of this state, and of the State or States or Territories by or under whose laws the said corporations, parties to such articles of consolidation were created or exist, before any such consolida-

tion shall have any validity or effect. Upon the filing for record of said copies, *the said corporations shall become merged in the new corporation* provided for in said articles, to be known thereafter by the corporate name therein adopted, and shall, within this state, succeed to all the rights, powers, franchises, contracts, privileges, immunities, liabilities, obligations and duties, liabilities to or exemptions from taxation, commutations, property, real, personal, and mixed, and things in action, as fully in all respects as the same were possessed by such old corporation or corporations, at the time of such consolidation under the laws of this state ; and such *new corporation* shall hold and enjoy the same, and all and every part thereof, without impairment or change, as fully as if the said consolidation had not taken place. Provided that all rights of creditors, and all liens upon the property of either of said old corporations shall be preserved unimpaired, and all debts, liabilities and duties of either of said consolidating corporations shall thenceforth attach to said *new corporation*, and be enforceable to the same extent, and in the same manner as if such debts, liabilities, and duties had been originally incurred by it ; provided further, that all such corporations shall be subject to the laws of this state, and the jurisdiction of the courts of this state, in the same manner and to the same extent as domestic corporations.

SECTION 3. *No railroad corporation shall consolidate with, lease or purchase, or in any other way become owner of, or control, any other railroad corporation, or any stock, franchises, rights of property thereof, which owns or controls a parallel or competing line.*

Gen. Laws 1881, chap. 94.

In the year 1899, the subject was again treated by the Legislature, in the following act :

CHAPTER 229.

AN ACT TO AMEND SECTION ONE (1) OF CHAPTER NINETY-FOUR (94) OF THE GENERAL LAWS OF ONE THOUSAND EIGHT HUNDRED AND EIGHTY-ONE (1881) ENTITLED "AN ACT TO AUTHORIZE ANY RAILROAD COMPANY TO LEASE, PURCHASE, OF IN ANY WAY TO BECOME OWNER OF, OR TO CONTROL, OR ANY OTHER RAILROAD CORPORATION, OR TO CONSOLIDATE THEREWITH."

Be it enacted, etc.

SECTION I. Section 1 of Chapter 94 of the General Laws of 1881, being Section 2714, General Statutes 1894, is amended so as to read as follows:

SECTION I. Any railroad corporation, either domestic or foreign, whether organized under a general law, or by virtue of a special charter, may lease or purchase, or in any way become the owner of, or control, or hold the stock, of any other railroad corporation, when their respective railroads can be lawfully connected and operated together, so as to constitute one continuous main line, with or without branches, and in case such lease or purchase shall be made by a foreign corporation, such corporation shall have and possess the same rights, powers, and privileges, and be subject to the same duties, obligations and liabilities, in respect to the railroad so leased or purchased, as the corporation from which such lease or purchase shall have been made.

Provided further, that any railroad so purchasing or leasing shall be subject to any law of this State now in force, or hereafter enacted, relating to taxation of the property so leased or purchased.

Provided, in case such lease or purchase shall be made, or such ownership or control had, by a foreign corporation, the same shall not be deemed complete or effectual for any purpose, until such foreign corporation shall have first complied with all laws of this State pertaining to foreign corporations.

Provided further, that no railroad corporation shall consolidate with, lease, or purchase, or in any way become owner of or control, another railroad corporation, or any stock, franchises, rights, or property thereof, which owns or

controls a parallel or competing railroad, to and with the railroad owned or controlled or operated by such leasing or purchasing railroad corporation; and the question whether any such railroads are parallel or competing lines, shall, when demanded by the party complaining, be decided by a jury, as in other civil actions.

SECTION 2. This act shall take effect and be in force from and after its passage.

Approved April 15, 1889.

The process meant to be described in Section 3, of the Act of 1881, and in the last *proviso* of Section 1, of the Act of 1899, by the term "consolidated," must have been the same one described in, and regulated by the Act of 1881. There is no ground for assuming that any other process was in the legislative mind.

The "consolidation" meant by the Act of 1874 is the one provided for by the General Statutes of 1866.

The "consolidations" provided for by the General Statutes of 1866 and the Act of 1881 were practically identical. They were absolutely so in the feature that the old corporations passed out of existence, and a new one rose in their stead. In fact, it is impossible to imagine what other kind of process could be described as a "consolidation." The term necessarily carries with it the sense of a firm and indissoluble union. Properties, franchises, shares of stock in separate companies, can never be "consolidated" while each retains its identity. The word "consolidate" must have been used in a single and uniform sense in all parts of these laws. It does not mean one thing in one place, and another in another.

Northern Pacific shares and Great Northern shares never can be "consolidated" so long as they remain Northern Pacific and Great Northern. They can never

be "consolidated" until they cease to be Northern Pacific and Great Northern, and are replaced by something else. No such thing has ever been contemplated, much less done.

Shares in separate corporations are not "consolidated" by passing into the ownership of the same person. They are things as distinct as if they had remained in separate hands. The shares of Northern Pacific and Great Northern owned by Northern Securities are not tied together in any way. They are not even mortgaged or pledged. Any part of them or all may be sold at any time. There is not the least implied promise or duty, on the part of Securities Company, to anybody, to retain its ownership of the shares of either railway company for an instant. No amount of force could stretch the meaning of the word "consolidation" far enough to cover a holding of stocks in this way.

It must be remembered also that the holding by Securities Company in each railway company forms part only of the latter's entire stock. There are many other stockholders in each railway company.

If by acquisition of the majorities of Northern Pacific and Great Northern stock the Securities Company became a "railroad corporation," what railroad corporation did it become? The Northern Pacific? The Great Northern? Did it acquire any franchise previously held by either Northern Pacific or Great Northern?

If it did, and became either Northern Pacific or Great Northern, or both, what has become of the minority stock of the two railway companies? What does that represent? Anything different from what it did when this same majority was held by others? If

not, everything, in regard to the Northern Pacific and Great Northern companies remains as before, and they remain the "railroad corporations." The Securities Company has not superseded them, or either of them.

It may be argued, that to allow the stockholders of one of these railway companies to individually buy the stocks of the other, would be to permit an "Evasion of the law." What is an "Evasion of the law?" And what are its legal consequences? Has any rule on either subject ever been formulated? If so, by whom? Where is the rule to be found? What are its application and extent? Every act done in *conformity* with law is an "evasion" of all laws prohibiting the doing of other acts. Every time a man passes his neighbor without killing him, he "evades" all statutes against homicide. None "evades" so many laws as those who obey all of them.

In this sense, and in this only, has the purchase by a *stockholder* in Great Northern, of shares in Northern Pacific, been an "evasion" of the Minnesota Statutes forbidding each *railway company* to buy shares in the other. A law forbidding a "railroad corporation" to buy certain stock can never be "evaded," in an improper sense, by somebody else purchasing it. The purchaser would obey, not "evade", the law.

It certainly did not occur to this Court that the stockholders of Great Northern would "evade" the laws by purchasing Northern Pacific stock, nor that the stockholders of Louisville and Nashville would "evade" the Constitution of Kentucky by purchasing the Chesapeake railroads. The Court never thought of that. On the contrary, the Court considered that the stockholders would obey *all* the laws in both in-

stances. The "evasion of law" theory is a much later discovery. As the Court said, the object of such laws is to prevent one *railroad corporation* getting control of another.

If the evidence showed that the real meaning of the parties here was to put one of these railway companies under control or management of the other, and the purchases by Northern Securities Company were planned merely to facilitate the carrying out of such an arrangement, then, and only then, might those purchases be regarded an "evasion" of the statute. But there is no evidence in that direction. The proofs are all the other way. Neither railway company is designed to have the smallest control of the other. On the contrary, each is, and is to be, controlled by the holders of its own stock, as formerly.

A consolidation of two railroad corporations, or the ownership by one of them of stock in the other, is not at all the same thing as ownership by a third party of portions of the stock of each. This Court remarked, in *Pullman's Palace Car Co. vs. Pacific Ry. Co.*, that the Missouri Pacific Company, by owning nearly all the stock of the Iron Mountain Company, had all the advantages of control of the Iron Mountain Railroad, but not that control itself; and the case turned wholly upon the total difference between one thing and another thing, giving to the possessor of it all the advantages of possession of the other.

So, even if it could be assumed that ownership by a third person of a majority of the stock of two companies would permit the owner of the stock to control the business of the two roads as much as could a consolidated company, the two species of control are not

at all the same thing. The one is merely indirect and moral, the other direct and immediate.

Prohibitions of doing designated acts do not forbid the doing of other acts, producing results somewhat similar to those flowing from the acts forbidden.

The prohibition of doing all things that accomplish certain results can be made only by a sweeping prohibition of everything leading to such results. Such is not the method in these acts.

It may also be said that the Minnesota Acts of 1874 and 1881 are to be regarded as expressions of a policy of the State against the placing of control over two competing railways, in the same body of men, in any form, and that the Courts should recognize and enforce the policy, though the words of the statutes may themselves fail to describe the things actually done or the doers of them.

The first answer to this is that neither in these acts, nor in any other parts of the State legislation, has any such policy ever been declared. Those who assert the existence of such a policy find it exclusively in their own minds, and not in the statute books of Minnesota.

Since the building of railways by corporations began in this country the stocks of those corporations have been bought and held, not only by individuals and partnerships, but by all sorts of corporations, including other railroad companies. The earliest statutes of Minnesota recognized and authorized the practice of railway corporations buying and holding each others' stocks. In addition to the general laws, substantially every early special charter authorized it in the most

unrestrained fashion. The charter of Great Northern is an example.

If the Legislature of Minnesota had ever reached the conclusion that the stocks of two competing railway companies ought, in no case, to be held by the same owner, it surely would have said so. That has always been the easiest thing to say. A half-dozen words, of the commonest kind, would suffice. The insertion of that many additional words, in the Acts of 1874 and 1881 would have done it. No legislature could so bungle as to stop with saying that "railroad corporations" may not do certain things, when it was trying also to stop individuals and other companies from doing them. A conclusive argument against the existence in Minnesota of such a legislative policy, is the fact that it has never been declared. Besides, as far back as the year 1896, the Supreme Court of the United States, being required to construe the Minnesota Acts of 1874 and 1881, expressly said that they do not include stockholders of railroad corporations. It must be assumed that all departments of the State government had immediate notice of this interpretation. No different one has since been given by any Court. The State Legislature has made no manifestation of dissent. The fact that it has not, proves that the interpretation of the Supreme Court is the one the Legislature meant the acts to have.

The Courts could not create a policy on the subject of who may buy and own property. Popular opinion could not do it; even leaving out of view the fact that no method of reliably ascertaining what public opinion is, outside of legislation, has yet been devised. The State Legislature alone can say what is the State policy in such matters. Until the Legislature speaks,

there is no state policy on the subject, and the extent of the policy is that of the declaration.

The laws are not an automatic contrivance, by which without legislative action, whenever a supposed public disadvantage arises, the thing at once becomes unlawful, and a complete remedy comes forth of its own accord. Legislatures are not such unnecessary arrangements as that would make them. Therefore, to show, if it could be shown, that a single ownership of a majority of the stocks of two competing railways would be hurtful to the public, would not be even the beginning of a demonstration that any law against it, or any public policy upon the subject of which the Courts could take notice, actually exists. The demonstration would have to go further, and include a statute that had been passed.

It is fair to presume that the restrictions of the Acts of 1874 and 1881 to the railroad corporations themselves was deliberate and purposed. The Legislature has never shared the recent views of some, that a practice under which the transportation systems of the country have been able to serve the public so well for fifty years has suddenly become a menace to it. Besides, the great bulk of all the stock of Minnesota railroad corporations has been issued under special charters that are contracts. By those charters the stocks have been given the status of personal property, without condition or limitation. What power has the Minnesota Legislature to subsequently limit the amount of a particular kind of property that may be owned by, say, a citizen of New Jersey? With a corporation of the State of Minnesota, the case is different. It may be admitted that a State may restrict the

capabilities of the corporations it creates. Such regulations merely define the power to buy. As the powers of a corporation all arise from the laws that have created it, or those under which it does business, those powers are necessarily limited to what the laws say they may be. A corporation can buy only what the laws of its creator say it may buy. But laws saying what a corporation of the State may buy, do not go to the right of an owner of property to sell it to any one capable of buying it. They do not operate on the seller at all. In this view, such legislation as the Minnesota Acts of 1874 and 1881 are supportable by the constitutions. The State is merely acting within its competence of naming the powers of the corporations it creates. But when a State has affixed the unrestricted status of personal property to certain things, in themselves harmless, can it subsequently say that the owner may not sell them to any natural person, anywhere, or to any other sort of person residing outside of its jurisdiction? If the State could do so, it would be because the State could pass beyond its own borders, and limit the right of those who have never been within its jurisdiction.

Undoubtedly, so far as concerns the shares of companies created by special charter, similar to that of Great Northern, the Minnesota Legislature went to the limit of its powers in the Acts of 1874 and 1881.

To extend those acts to persons and corporations not mentioned in them, would be to thrust into them words that the Legislature itself has refrained from putting there. For such an interpolation, there would be no authority.

The Act of 1889, mentioned, and to some extent relied on, by appellant, is as follows:

CHAPTER 228.

AN ACT TO AMEND SECTION TWO (2) CHAPTER NINETY-FOUR (94) OF THE GENERAL LAWS OF THE YEAR ONE THOUSAND EIGHT HUNDRED AND EIGHTY-ONE (1881) RELATING TO CORPORATIONS.

Be it enacted, etc.

SECTION I. That Section two (2) of chapter ninety-four (94) of the general laws for the year one thousand eight hundred and eighty-one (1881), relating to corporations, is hereby amended, by adding at the end thereof the following:

Any railway company of this state, empowered by the laws thereof to consolidate its railway, property and franchises, or any portion thereof, with the railway property and franchises, or any portion thereof, of another railway company, may effect such consolidation or purchase, by acquiring the stock, bonds or other securities of such other railway company; and for the special purpose of acquiring the same, may create, issue and dispose of its own stock, bonds or other securities, in addition to the amounts of the same it is otherwise empowered to issue, to an amount not exceeding the actual value of the stock or bonds of such other company, acquired by it. Any railway company of this state may also, for any other purpose authorized by its acts or articles of incorporation, create, issue and dispose of such amounts of stock as the boards of directors may find necessary for such purpose. Prior to the issuance of any stock under the provisions of this act, the company issuing the same shall file with the secretary of state a duly authenticated resolution of its board of directors, stating the number and par value of the shares to be issued, and the particular purposes for which the same are to be issued.

Provided, That nothing in this act contained shall authorize any railway company to sell its capital stock for less than full par value thereof, in money, property, work or services.

Provided further, That nothing in this act shall be so construed as to authorize the issuance or

sale of any stock or bonds, by any such company, or the performance of any act, prohibited by chapter twelve (12) of the general laws of one thousand eight hundred and eighty-seven (1887), or by any other law of this state relating to the issuance or sale of the stock and bonds of any railway company therein.

SEC. 2. This act shall take effect and be in force from and after its passage.

Approved April 24, 1889.

(NOTE. Chap. 12, Laws 1887, referred to in the foregoing act, was entitled "*An act relative to the issue of false, fraudulent, and part-paid and unpaid shares of the stock of railroad companies and providing a penalty therefore.*" The title of the act sufficiently discloses the nature of its contents.)

This act of 1889, allowing a corporation permitted to consolidate with another, to effect such consolidation by acquiring the stock or bonds of such other, does not make such acquisition itself a consolidation. It merely permits consolidations to be made under the provisions of Section II. of the Act of 1881, in cases where the parties might be unable to observe certain of the formalities therein required, according to their manifest spirit.

It will be noticed, that an essential step in consolidation, under the Act of 1881, is its approval by the stockholders of each of the consolidating companies; but where the stock of one company is owned by the other, it might be claimed that, in reality, the approval would be the act of but one of the companies; and the validity of a consolidation under such circumstances might be subject to doubts, that would impair the credit, and hence the usefulness to anybody, of the resulting new corporation.

The Act of 1889 removes this difficulty, and that was undoubtedly its purpose. The obvious meaning of the

act is, that one corporation may buy the stock or bonds of another, for the express purpose of causing a consolidation with the other, and then use such securities for accomplishment of the purpose, without giving other and perhaps dissenting interests the right to object that the same party is acting on both sides of the transaction. The Act of 1889 was in line with the fixed policy of the State to encourage and facilitate unification of railway ownership and control.

The act was not passed to introduce into the statutes a new mode of uniting two previously separate and distinct corporations. Mere ownership by one company of the stocks and bonds of another could not put them together. They would remain as separate and distinct companies afterward as they had been before. The Legislature could not have meant to provide a process for uniting corporations which plainly could not unite them.

In another part of that act the Legislature further encouraged and facilitated consolidations by empowering corporations which buy the stocks and bonds of other companies with the view of afterward consolidating to issue and sell their own shares for making the purchase to any amount that may be needed for the operation, regardless of the limitations imposed upon the amount of their stock by their charters.

W. P. CLOUGH,
Of Counsel for Respondent Northern Securities Company.